MEETING THE NEEDS OF STUDENTS WITH PHYSICAL IMPAIRMENTS UNDER SECTION 504

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A note about these materials: These materials are not intended as a comprehensive review of all case law, rules, and regulations on the topic, but as an overview of the issues involved as schools comply with their Section 504 duty to evaluate and serve students with physical impairments and medical needs. Note that while Section 504 covers individuals with both physical and mental impairments, these materials focus on the school's duty to evaluate and serve students with physical impairments. These materials are not intended as legal advice, and should not be so construed. State law, local policy, and unique facts make a dramatic difference in analyzing any situation or question. Texas law is used only as an example of one state's approach. Please consult a licensed attorney for legal advice regarding a particular situation.

In addition to the Section 504 regulations and OCR Letters of Finding, these materials will also cite guidance from two important OCR documents. First, a Revised Q&A document has been posted on the OCR website since March of 2009 addressing some of the ADAAA changes. This document, *Protecting Students with Disabilities: Frequently Asked Questions about Section 504 and the Education of Children with Disabilities* (March 27, 2009, last modified March 17, 2011), is available on the OCR website at www.ed.gov/about/offices/list/ocr/504faq.html and is referenced herein as "Revised Q&A." In January, OCR released a long-awaited guidance document on the ADAAA and its impact on Section 504. The "Dear Colleague Letter" consisted of a short cover letter and a lengthy new question and answer document. *Dear Colleague Letter*, 112 LRP 3621 (OCR 2012)(hereinafter "2012 DCL"). References to the U.S. Department of Education will read "ED."

Learning Objectives:

- 1. Understand the impact of the ADAAA on Section 504 eligibility in general, and on students with physical impairments in particular.
- 2. Recognize how and when medical data is needed to determine eligibility and appropriate services under Section 504.
- 3. Recognize how to make accommodation and services decisions to meet the educational needs of a disabled student as adequately as the needs of nondisabled students are met.

I. The Section 504 Duty to Evaluate & the Student with Physical Impairments

- A. Correcting a misconception: Section 504 eligibility for students with physical impairments
 - 1. Some districts ignored major life activities other than "learning"

Some of the first Letters of Finding issued by OCR following the implementation of the ADAAA exposed the problem of schools hyper-focusing on the major life activity of learning and ignoring the possibility of Section 504 eligibility due to substantial limitation in any of the other major life activities. A few examples....

Asthma and the major life activity of "learning." In *Memphis (MI) Community Schools, 54* IDELR 61 (OCR 2009), the school had taken the position that a student could *only* qualify for Section 504 if the student's physical or mental impairment substantially limited the major life activity of learning. The student at issue was asthmatic, and his impairment did not impact his learning or education. The student received a medical management plan. The "District advised OCR that, prior to December

2008, it generally had been using medical management plans instead of Section 504 plans for students with impairments who were not displaying difficulties in academic performance but who needed assistance with medical needs. If the impairment was determined not to have an impact on the student's education, the District would determine that the student did not qualify for a Section 504 plan and would instead provide a medical management plan for medical needs."

However, after training on the ADA Amendments... "The District stated that it is now changing how it conducts eligibility determinations to ensure that they are based on whether one or more of a student's major life activities, not just learning, are substantially limited by a mental or physical impairment." To correct its error, the district sent a letter to parents of students on health plans indicating that it would be reviewing each child's situation under the correct standard. Additionally, under a resolution agreement, new Section 504 procedures were to be drafted and published to all parents and students, and training provided to relevant staff on Section 504. The district also agreed to reevaluate any student who was denied eligibility for disability services or terminated from a Section 504 plan during the 2008-09 school year using the correct definition of disability (as opposed to the school's previous understanding) as required in the Section 504 regulations and the ADA Amendments Act.

Bone cancer and "learning." In *Union City (MI) Community Schools*, 54 IDELR 131 (OCR 2009), the District refused to provide accommodations for a student with bone cancer in a Section 504 plan because the child's impairment did not impact the major life activity of learning. OCR noted, however, that the impairment periodically affected the student's ability to walk, climb steps, participate in P.E., attend field trips, and obtain transportation services. OCR held that the district's use of an unduly restrictive definition of major life activities (excluding consideration of those other than learning) and its failure to evaluate the student in a timely manner denied the student FAPE.

Other physical impairments and "learning." In Oxnard (CA) Union High School District, 55 IDELR 21 (OCR 2009), a Section 504 committee responded to a parent referral and addressed the potential Section 504 eligibility of a student with irritable bowel syndrome (IBS) and another digestive condition. The team noted that the student was making good grades in advanced classes with the help of accommodations provided under a campus student services team (SST) process. Thus, the team determined that the student's condition did not substantially limit his learning, and that he was not eligible under Section 504. OCR found the district in violation of the law, since the team did not address whether the student's IBS substantially limited his major life activity of digestive function (and presumably bowel function). In addition, OCR found that the team failed to consider that the condition caused frequent absences and a declining GPA when it determined that his condition did not substantially limit his learning. See also North Royalton (OH) City School District, 52 IDELR 203 (OCR 2009) (school failed to properly consider eligibility of child with peanut allergy when it looked only at the degree the condition affected academic performance).

A little commentary: While these misconceptions of eligibility were uncovered following the ADAAA, OCR had warned as early as 1995 that schools should look at other major life activities as well.

"Students may have a disability that in no way affects their ability to learn, yet they may need extra help of some kind from the system to access learning. For instance, a child may have very severe asthma (affecting the major life activity of breathing) that requires regular medication and regular use of an inhaler at school. Without regular administration of the medication and inhaler, the child cannot remain in school." *Letter to McKethan*, 23 IDELR 504 (OCR 1995).

OCR provided some additional examples of impairments impacting other major life activities in the 2012 guidance. "(1) a student with a visual impairment who cannot read regular print with glasses is substantially limited in the major life activity of seeing; (2) a student with an orthopedic impairment who cannot walk is substantially limited in the major life activity of walking; and (3) a student with

ulcerative colitis is substantially limited in the operation of a major bodily function, the digestive system." 2012 DCL, p. 6, Question 7.

2. A history of health plans for physical impairments rather than Section 504 Plans

By way of reference, the author uses the phrase "health plans" as a catch-all term to describe protocols or processes put in place for an individual student to maintain the student's health at school or to respond to a health emergency at school. In everyday school usage, a "health plan" is limited to health issues and rarely addresses the educational supports or services that a student might need due to an impairment. Some schools use phrases like "individualized health care plan," "emergency plan," or a name that directly references the impairment like "allergy plan" to convey the same idea.

In addition to districts that simply failed to consider the impact of physical impairments on major life activities other than learning, other districts used something akin to tiered intervention thinking, and concluded that Section 504 was not necessary if a health plan could meet the student's needs. For example, in a pre-ADAAA Indiana case, OCR found that the District's practice of not serving all students with diabetes under Section §504 or IDEA was appropriate, as long as such students had protocols in place to address their medical conditions, and the District included language in future student/parent handbooks that read "Section 504 plans may be developed for those students with a disability whose parents/guardians are able to provide sufficient medical documentation that indicates that there is a need for such services." *Hamilton Heights (IN) School Corp.*, 37 IDELR 130 (OCR 2002). This "regular ed health plan makes §504 unnecessary" approach is of course complicated by the ADAAA's mitigating measures rule.

Post-ADAAA, OCR has determined that health plans and emergency plans are mitigating measures. North Royalton (OH) City School District, 52 IDELR 203 (OCR 2009). Prior to the effective date of the ADAAA, North Royalton initially found the student with an anxiety disorder and tree nut allergy ineligible for Section 504 due to the effectiveness of his emergency allergy plan. OCR determined that at no point was the student denied appropriate services. Further, OCR did not dispute the school's claims that the student never had a reaction to nuts at school, and never visited the health services coordinator due to anxiety or allergy issues. Nevertheless, in November 2008, prior to the ADAAA going into effect, the school reconsidered the eligibility question, and found the student Section 504-eligible under the new rules, with his EAP becoming his \$504 plan on Jan. 1, 2009. As the student's needs had been met throughout, OCR found no violation with respect to the child's services (so no compensatory education was required) but did conclude that his initial evaluation was inappropriate as it only considered limitations to the major life activity of learning (like the *Memphis* case, previously discussed). With respect to health plans (or the EAPs here), OCR required the school to apply the ADAAA to future evaluations. "In doing so, the district will also apply the new ADAAA standards and will not take into account mitigating measures, such as the use of medicine or the provision of related aids and services, such as those provided in EAPs, when determining students' disability status."

A little commentary: A fact revealed during OCR's investigation leads to an interesting question. "The district also stated, however, that no other student with a food allergy being served under an EAP — approximately 40 District students — has been identified as a student with a disability and provided a Section 504 plan since the ADAAA took effect on January 1, 2009." Interestingly, the resolution agreement with OCR did not require the school to review the files of the other students on EAPs to determine whether referral to Section 504 should be made. Instead, OCR was satisfied with the following: "The district will issue a letter to the parents/guardians of all students in the District who are currently receiving services under Emergency Allergy Plans of the district's Section 504 procedures and of their right to request an evaluation under Section 504, at no cost to them, if they believe that their child may have a disability because the child's medical impairment substantially limits one or more major life activities." But see also, Isle of Wight County (VA) Public Schools, 111 LRP 1964 (OCR 2010) (as part of a resolution agreement, the school agrees

to review all students on medical/health plans and determine which students need to be referred to Section 504); *Memphis (MI) Community Schools*, 54 IDELR 61 (OCR 2009) (as part of a resolution agreement, the school agrees to reevaluate all students on medical management plans denied 504 eligibility or dismissed from Section 504 during the 2008-09 school year). **Note the absence of language from OCR indicating that all students on health plans are Section 504 eligible.**

Given the history described above, OCR provided the following language on the adequacy of health plans versus Section 504 plans in its 2012 guidance. The question focuses on students served on health plans prior to the ADAAA and whether that status can continue without Section 504 eligibility *after* the ADAAA.

"Q13: Are the provision and implementation of a health plan developed prior to the Amendments Act sufficient to comply with the FAPE requirements as described in the Section 504 regulation?

A: Not necessarily. Continuing with a health plan may not be sufficient if the student needs or is believed to need special education or related services because of his or her disability. The critical question is whether the school district's actions meet the evaluation, placement, and procedural safeguard requirements of the FAPE provisions described in the Section 504 regulation. For example, before the Amendments Act, a student with a peanut allergy may not have been considered a person with a disability because of the student's use of mitigating measures (e.g., frequent hand washing and bringing a homemade lunch) to minimize the risk of exposure. The student's school may have created and implemented what is often called an 'individual health plan' or 'individualized health care plan' to address such issues as hand and desk washing procedures and EpiPen use without necessarily providing an evaluation, placement, or due process procedures. Now, after the Amendments Act, the effect of the EpiPen or other mitigating measures cannot be considered when the school district assesses whether the student has a disability. Therefore, when determining whether a student with a peanut allergy has a disability, the school district must evaluate whether the peanut allergy would be substantially limiting without considering amelioration by medication or other measures. For many children with peanut allergies, the allergy is likely to substantially limit the major life activities of breathing and respiratory function, and therefore, the child would be considered to have a disability. If, because of the peanut allergy the student has a disability and needs or is believed to need special education or related services, she has a right to an evaluation, placement, and procedural safeguards. In this situation, the individual health plan described above would be insufficient if it did not incorporate these requirements as described in the Section 504 regulation." 2012 DCL, Question 13. p. 9-10 (emphasis added).

A little commentary: If, on the other hand, there is no belief that the student needs special education or related services due to her peanut allergy, she has no right to evaluation, placement and the procedural safeguards. Her health plan would be sufficient. See, for example, Cleveland (MT) Elementary School District No. 14, 111 LRP 34458 (OCR 2011)(As part of a resolution agreement, the District agrees to draft policies and procedures that "provide each student with the diabetes management services the student needs, consistent with the student's Section 504 plan, individualized education program, or individual health plan.").

B. The Section 504 Duty to Evaluate

The school's duty to evaluate under Section 504 is triggered by the school's suspicion that the student is disabled and in need of services. The Section 504 regulation on evaluation provides: "A recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement." 34 CFR §104.35(a). In short, a student should be referred to §504

when the District believes that the student may be eligible, i.e., when the District believes that the student has a physical or mental impairment that substantially limits one or more major life activities, AND believes that the student is in need of either regular education with supplementary services or special education and related services. *Letter to Mentink*, 19 IDELR 1127 (OCR 1993). This trigger did no change with the ADAAA, as the 2012 OCR guidance makes clear, a school district must conduct an evaluation of any individual who because of disability "needs or is believed to need special education or related services." 2012 DCL, Question 8, p. 7 (citing 34 CFR §104.35(a)).

The duty does not depend on parent request for evaluation. West Contra Costa (CA) Unified School District, 42 IDELR 121 (OCR 2004) ("The District had this obligation under Section 504 whether or not the parent made a request for an assessment.") What choices does the school have when parents request a Section 504 evaluation? There are two: evaluate the student OR refuse to evaluate and provide the parent with Section 504 notice of rights. See, for example, Bryan County (GA) School District, 53 IDELR 131 (OCR 2009) ("Under Section 504, upon receiving notice of a parent's belief that a child has a disability triggering Section 504 protection, the district should determine whether there is reason to believe that the child, because of a disability, may need special education or related services and thus would need to be evaluated. If the district does not believe that the child needs special education or related services, and thus refuses to evaluate the child, the district must notify parents of their due process rights.").

C. The modern disconnect between §504 eligibility as a student with a disability and the §504 duty to evaluate.

Prior to the ADAAA, most school districts operated under the assumption that Section 504 eligibility required (1) a physical or a mental impairment that substantially limits one or more major life activities, and (2) need for accommodations or services. Just as IDEA includes a "needs special education and related services" requirement for eligibility, the assumption was that Section 504 had a similar "needs services" requirement. This thinking logically followed from the regulatory trigger for the school's duty to evaluate under §504—the school has a duty to evaluate when it suspects disability together with the student's need for services. §104.35(a).

Post-ADAAA Section 504 eligibility is not contingent on a student's need for services. At least two OCR decisions in the last few years (and the January 2012 Dear Colleague Letter) highlight a view of Section 504 eligibility not previously recognized by most public schools. In these decisions, OCR has separated the eligibility questions from the question of whether the student needs a Section 504 plan. See, e.g., Memphis (MI) Community Schools, 54 IDELR 61 (OCR 2009) ("The procedures also state that a student is not eligible under Section 504 as a student with a disability if the student does not need Section 504 services in order for the student's educational needs to be met, which conflates the determination of disability with placement and services decisions, which should be separate"). See also, Oxnard (CA) Union High School District, 55 IDELR 21 (OCR 2009)(applying similar analysis to mitigating measures, OCR wrote: "Though the positive impact of accommodations is pertinent in evaluating the effectiveness of those accommodations, their impact should not be conflated with the issue of eligibility").

A technically eligible student? The "technically eligible" student is one who despite meeting Section 504 eligibility criteria, does not need services from the school. In other words, she has a physical or mental impairment that substantially limits one or more major life activities, but is not in need of a Section 504 Plan. Following the ADAAA, technically eligible students include the student with an impairment in remission (who receives no services because the impairment does not create a need for services), and the student whose needs are met through mitigating measures that he or she controls (so services from the school are not required to meet the student's needs). OCR provided the following example of the mitigating "type" of technically eligible student.

"For example, suppose a student is diagnosed with severe asthma that is a disability because it

substantially limits the major life activity of breathing and the function of the respiratory system. However, based on the evaluation, the student does not need any special education or related service as a result of the disability. This student fully participates in her school's regular physical education program and in extracurricular sports; she does not need help administering her medicine; and she does not require any modifications to the school's policies, practices, or procedures. The school district is not obligated to provide the student with any additional services. The student is still a person with a disability, however, and therefore remains protected by the **general nondiscrimination provisions** of Section 504 and Title II." 2012 DCL, p. 9, Question 11 (emphasis added).

So what does the technically eligible student get from Section 504? The technically eligible student would get no Section 504 Plan because there is no need for services, but what about procedural protections? Prior to the 2012 guidance letter, the author assumed that the technically eligible student would receive manifestation determination, procedural safeguards, periodic reevaluation or more often as needed, as well as the nondiscrimination protections of Section 504. Should need for a §504 plan develop, the Section 504 Committee would reconvene and develop an appropriate §504 services plan at that time. Note, however, that in OCR's severe asthma example the student receives no services or Section 504 Plan, but remains protected by the "general nondiscrimination provisions" of Section 504 and the ADA. It would be helpful for OCR to identify precisely the rights due a technically eligible student encompassed within that phrase "general nondiscrimination provisions."

The result of the new ADAAA rules is a "disconnect" between Section 504 eligibility criteria and the Section 504 duty to evaluate. To trigger the Section 504 duty to evaluate, there must be suspicion of need for special education or related services. However, to be a student with a disability under Section 504, no need for special education or related services is required. The following summaries provide examples of facts sufficient to trigger the school's Section 504 duty to evaluate.

Can the school's knowledge of the student's need for medication, coupled with school troubles trigger the duty to evaluate? Yep. Metro Nashville (TN) Public Schools, 110 LRP 49252 (OCR 2009). "In this case, the School specifically had information relating to the Student's asthma condition and his need for medication every four hours, as specified in the Medications Form and in a letter from the Student's physician[;] his frequent absences from School and hospitalization due to his asthma; his academic failure; and his behavior. While the School convened two S-Team meeting and identified intervention strategies, a Section 504 eligibility evaluation was warranted to determine whether the Student had a disability that substantially limited one or more major life activities under Section 504."

Student's need for homebound services because of disability triggers duty to evaluate. Lacking appropriate staff and a health plan to address the medical needs of a student with diabetes, the school placed the student on homebound instruction. OCR determined that this was a significant change of placement for a student because of a physical impairment, requiring a Section 504 evaluation first. In essence, the school knew of the impairment and the resulting need for services. Thus, the school had a duty to conduct a Section 504 evaluation before it could place the student in homebound. "Further, because LPCS placed the student in an in-home tutoring environment, which was a more restrictive environment than what the student had previously and subsequently been provided, LPSC failed to comply with [the Section 504 LRE requirement at] 34 C.F.R. §104.34(a)." *Lourdes (OR) Public Charter School*, 57 IDELR 53 (OCR 2011).

Where a student with an impairment is not in need of special education or related services from the school, the plain language of the §504 regulation on evaluation is not triggered. Consequently, an evaluation of this type of student would likely occur only in response to parent referral. Additional thought on referral with respect to students on health plans is provided in the Section 504 Update handout.

D. Medical Data Issues

1. Does the §504 Committee need a medical diagnosis as part of its evaluation data? No medical diagnosis is required for §504 eligibility. "Section 504 does not require that a school district conduct a medical assessment of a student who has or is suspected of having ADHD unless the district determines it is necessary in order to determine if the student has a disability." Williamson County (TN) School District, 32 IDELR 261 (OCR 2000). In fact, the regulations do not require medical evaluations for any disability to qualify under §504.

For context, consider that a medical diagnosis isn't required by federal law for OHI under special education. See also Letter to Parker, 18 IDELR 965 (OCR 1992)("If a public agency believes that a medical evaluation by a licensed physician is needed as part of the evaluation to determine whether a child suspected of having ADD meets the eligibility criteria of the OHI category, the school district must ensure that this evaluation is conducted at no cost to parents. However, if a school district believes that there are other effective methods of determining whether a child suspected of having ADD meets the eligibility requirements of the OHI category under Part B, then it would be permissible to use other qualified personnel to conduct the evaluation, so long as all of the protection in evaluation requirements of 34 CFR §§300.530-300.534 are met."). Note that state law can require a medical evaluation for purposes of OHI. Texas law, for example, includes such a requirement.

Even in states that require a medical doctor's signature on the OHI form, special education eligibility requires more than just the signature. In response to a question from the Learning Disabilities Association of Texas, OSEP [the Office of Special Education Programs] reminded us that a doctor's signature does not end the OHI determination. First, federal law does not require the doctor's signature (that's a state requirement). Second, educational determinations must be made by the IEP Team. "Although public agencies have the discretion to require a medical diagnosis of ADD/ADHD as part of the child's evaluation under the OHI category, the multidisciplinary team must determine whether the child needs special education and related services due to the existence of any such impairment. Therefore, a physician's statement that a child has ADD/ADHD would be insufficient by itself to establish eligibility under Part B." *Letter to Gallagher*, 24 IDELR 177 (OSEP 1996).

So what's the rule? The §504 regulations require no medical diagnosis for eligibility. The school may conduct the §504 evaluation without a medical diagnosis if it believes it has other effective methods of determining the existence of a physical or mental impairment. On the other hand, should the school desire a medical diagnosis, it must secure one at no cost to parent. What are "other effective methods"? Remember that the §504 Committee is not asked to "diagnose" impairments, but to identify impairments so that the Committee may meet the needs of the child arising from the impairment. Committees accomplish this by a combination of methods such as student observations, behavior checklists, screening instruments, test scores, grade reports, and review of other available data to (1) identify the impairment and (2) screen out nondisability causes for the student's struggles.

2. What if the school thinks it needs medical data? Then it should get the medical data. Bethlehem (NY) Central School District, 52 IDELR 169 (OCR 2009). A student allergic to peanuts, dairy, egg, kiwi, and crab wanted to participate in the school's culinary arts program. The student's allergist opined that the student could safely participate as long as he wore gloves while handling the peanuts and did not ingest any of the foods to which he is allergic. Despite that information, the school was concerned about the student's safety in the class, and staff "concluded that they required additional information about the extent and nature of the student's allergies." To that end, they requested that the parents obtain a letter from the allergist with respect to the student's participation in the culinary class. A letter was provided, but did not allay the school's concerns with respect to "airborne allergens, accidental ingestion, food fights, etc." The parent signed a release to allow the school to talk with the allergist who was on vacation when the district attempted contact. "School staff acknowledged that they made no subsequent efforts to obtain the additional

information." The student was denied enrollment in the class. OCR found a violation as the school did not convene a Section 504 Committee to make these determinations and did not identify the student as a student with a disability. Further, the school denied him enrollment because the school believed it did not have adequate medical information to determine if the student could participate safely. "District staff members acknowledged that they could have sought additional information from the Student's allergist prior to excluding the Student from the Course for school year 2008-2009, but they did not do so."

A little commentary: It's fairly simple: if the Committee thinks that it needs medical data in order to make an eligibility or placement decision, it has to get the data to make the decision. The school, not the parent, has the duty to evaluate.

When does the school have a duty to pursue medical data? Seattle (WA) School District No. 1, 54 IDELR 34 (OCR 2009). Although the parent informed the school that the student had been diagnosed with ADD, was taking ADD medication and suffered from a seizure disorder, the parent did not provide medical documentation to the school. The school requested medical information from the parent, but the parent did not provide the information and the school did not seek to speak directly to the doctor. No medical documentation was reviewed, but the SIT team determined the student was Section 504 eligible, and developed a plan that does not list the interventions he would receive (staff continued to implement SIT Team accommodations including a seat cushion, weighted vest, and touching his shoulder to encourage attention). The plan indicated that the parent was responsible for follow-up with "behavioral/neurological assessment and treatment." OCR determined that the school's evaluation of the student was inappropriate, and the resulting §504 plan was also inappropriate.

"District staff suspected the student had a disability affecting his behavior, which in turn affected his learning, from the beginning of the school year. While the district staff met several times and attempted numerous interventions and accommodations, the district did not conduct an evaluation of the student's disability-related needs that included a consideration of a medical or health care specialist's evaluation regarding the nature, extent, and severity of the student's disability. **District staff consistently indicated that they believed they needed this type of medical information in order to determine an appropriate educational program and placement for the student."** (emphasis added).

A little commentary: Once the §504 Committee determines that it needs medical data to evaluate the student for eligibility or to appropriately understand the impairment to create a plan, it must seek the necessary medical data to make the appropriate decisions. The §504 Committee, having concluded that such data is required, cannot then shift the burden to the parent to provide appropriate medical records or data. The school has the duty to evaluate, at no cost to parent. Having determined it needed medical information, and that the parent was not providing the required data, the school should have sought the required data on its own.

What if medical data exists, the school doesn't make an effort to see it, but determines that there is no physical or mental impairment? *Prevail Academy (MI)*, 109 LRP 30937 (OCR 2009). A Section 504-eligible student with asthma and a severe peanut allergy transferred to the Academy with a Section 504 Plan. Seven months after the student's parent requested that the Academy follow the plan or conduct a §504 evaluation and create a plan, the Academy finally conducted a Section 504 evaluation. The Section 504 Committee, comprised of the principal and two teachers determined that the student did not have a physical or mental impairment. OCR found the Academy's evaluation in violation of Section 504.

"Specifically, the principal and one of the student's teachers acknowledged that, when they assessed the student, they did not obtain any current medical or other information regarding the student's particular medical condition and circumstances or any records from her previous school to

assist them in determining whether the student has a medical impairment that substantially limits one or more major life activities or how the impairment affected the student's ability to participate at school. Rather, the 504 Committee considered anecdotal information based on the two teachers' observations of the student and reviewed the information complainant submitted at the beginning of the school year, which did not include any medical documentation or records from the student's former schools. With respect to its determination, the principal told OCR that the 504 committee found that the student did not suffer from a physical or mental impairment because she was progressing in her academics, had good attendance, seemed healthy at school, and had good stamina."

Further, one of the teacher's told OCR that the student could not have a physical or mental impairment because "peanut allergies" was not among the impairments listed on the Academy's evaluation form. Despite the parent's offer to sign a medical release form, the school did not seek to review any medical data, and didn't look at data from previous schools, but denied eligibility anyway. OCR determined that the school failed to draw upon data from a variety of sources (among other problems) and "did not properly understand how to determine whether the student has a physical impairment[.]"

3. Does a dispute over a medical release mean that the school need not complete the §504 evaluation? No. In response to a parent's request for §504 services based on the student's depression and severe allergies, the school provided the parents with a medical release form. The parent argues that the form was never received. The school argues that since it never got a signed release and could not get access to medical records, it had no duty to complete an evaluation. OCR concluded that the delay was a §504 violation. "Where as part of an evaluation of a student with disabilities, such as clinical depression and severe allergies, a school district determines, based on the facts and circumstances of the individual case, that a medical assessment is necessary, the district must ensure that the student receives this assessment at no cost to the parents." The District agreed to corrective action including a §504 evaluation and a determination of whether compensatory services were owed for the delay. Rose Hill (KS) Public Schools, USD #394, 46 IDELR 290 (OCR 2006).

See also, Muscogee County (GA) School District, 111 LRP 19301 (OCR 2010)("OCR also learned that the District has a practice of requiring parents to obtain and submit medical documentation before initiating a Section 504 evaluation. Putting the onus on parents to obtain such documentation before evaluating a student is contrary to Section 504's requirement that District's provide students with FAPE. In addition to improperly shifting the financial burden to the parents, such a practice could dissuade parents who do not have the time or resources to obtain such documentation from seeking Section 504 services in the first place.").

If the school can't get the medical data it needs, what happens to the evaluation? The evaluation should still proceed to an eligibility determination on the basis of the data available to the Committee. OCR has found no violation where a district refused to base eligibility on the parents' assurances that a student suffered from multiple chemical sensitivity (MCS). Montgomery County (MD) Pub. Schools, 31 IDELR 84 (OCR 1999). The parent provided the district with medical documentation of the condition (we're not told what was provided), but the district was either skeptical or did not have enough information to make the eligibility determination. The district sought to get its own medical evaluation of the child, but the parent refused, arguing that the district's evaluation would not be administered by competent personnel. The district completed the evaluation by reviewing the data it had, but never formally identified the student as MCS. OCR found no §504 violation for the failure to identify the student as having MCS, since "the student's parent refused to authorize the district to secure an independent evaluation of the student concerning his suspected MCS" and the district "had insufficient evaluative materials to make an informed placement decision as required by Section 504." While not explicitly stated in the decision, at issue could be the requirement to not base eligibility upon a single source of evaluation data (here, the parent's assurances). §104.35(c)(1) & Appendix A, p. 430.

- **4.** Can the §504 Committee reject a medical diagnosis? Note that in the *Gloucester County* case, discussed below, OCR paid special attention to the fact that the medical information provided by the parent was not contradicted. Even if the §504 Committee has concerns that a medical diagnosis may be suspect, OCR reminds us that the doctor is imminently more qualified to determine an impairment than is the §504 Committee. Of course, Section 504 Committees do not diagnose impairments, but identify impairments for educational purposes as part of the evaluation. As a practical matter, *absent medical data to the contrary*, the §504 Committee cannot ignore a diagnosis with which it does not agree. *Gloucester County (VA) Public Schools*, 49 IDELR 21 (OCR 2007).
- **5. Does every piece of data have the same value? No.** The Section 504 Committee determines the weight to be given to outside evaluations including medical diagnoses, and all data that it reviews.

"Question 26. How should a recipient school district handle an outside independent evaluation? Do all data brought to a multi-disciplinary committee need to be considered and given equal weight? The results of an outside independent evaluation may be one of many sources to consider. Multi-disciplinary committees must draw from a variety of sources in the evaluation process so that the possibility of error is minimized. All significant factors related to the subject student's learning process must be considered. These sources and factors include aptitude and achievement tests, teacher recommendations, physical condition, social and cultural background, and adaptive behavior, among others. Information from all sources must be documented and considered by knowledgeable committee members. The weight of the information is determined by the committee given the student's individual circumstances." Revised Q&A (emphasis added).

Some things doctors say have more weight than others. *Marshall Joint School District* #2 v. C.D., 54 IDELR 307, 616 F.3d 632 (7th Cir. 2010). A student with Ehlers-Danlos Syndrome, a genetic disorder that causes hypermobility, suffered from "poor upper body strength and poor postural and trunk stability." He had previously required adaptive P.E. due to these physical issues, but now only requires slight modifications for his medical and safety needs. As adaptive P.E. was the only special education required by the student, the school sought to dismiss him from special education since he no longer needed special education. The Administrative Law Judge (ALJ) ruled that the student could not be dismissed, relying in large part on evidence from the student's doctor that "the EDS causes him pain and fatigue and when he experiences that 'it can affect his educational performance." The 7th Circuit rejected the ALJ's finding with some excellent analysis.

"Dr. Trapane was the main source of evidence cited for the proposition that the EDS adversely affects C.D.'s educational performance. And the sole basis of her information was C.D.'s mother. Dr. Trapane evaluated C.D. for 15 minutes; she did not do any testing or observation of C.D. and his educational performance. In fact, 'Dr. Trapane admitted that she had no experience or training in special education and never observed C.D. in the classroom.' ... Her only familiarity with the curriculum was with her own children. Such a cursory and conclusory pronouncement does not constitute substantial evidence to support the ALJ's finding.... The cursory examination aside, Dr. Trapane is not a trained educational professional and had no knowledge of the subtle distinctions that affect classifications under the Act and warrant the designation of a child with a disability." (Emphasis added).

Further, the doctor's pronouncement indicated that the EDS could affect performance. Said the court, there was no substantial evidence that it actually had such an affect. For evidence on the student's need for services, the court looked not to the doctor, but to the adaptive P.E. teacher who was "the one who could testify best concerning whether he needed special education to participate in the gym curriculum and meet the goal for children in his grade level."

A little commentary: This case is best known for a couple of snippets of language you're likely to hear a lot at law conferences.

"It was the team's position throughout these proceedings that physicians cannot simply prescribe special education for a student. Rather, that designation lies within the team's discretion, governed by applicable rules and regulations. We agree.... This brings us to a key point in this case: a physician's diagnosis and input on a child's medical condition is important and bears on the team's informed decision on a student's needs.... **But a physician cannot simply prescribe special education**; rather, the Act dictates a full review by an IEP team composed of parents, regular education teachers, special education teachers, and a representative of the local education agency[.]" (emphasis added).

6. Can a neurologist's report, by itself, constitute a §504 evaluation? No. Rather than conducting its own evaluation, the school relied on an outside neurologist's report obtained by the parents to determine that the student was §504-eligible due to Tourette Syndrome and ADD, and created a §504 plan. The school did not attempt to evaluate areas of educational need nor did it apparently review any data other than the outside report. OCR found a variety of intertwined §504 violations related to the absence of an evaluation of the student's educational needs. *Cle Elum-Roslyn (WA) School District No. 404*, 41 IDELR 271 (OCR 2004).

A little commentary: The criticism here is not directed at the school's reliance on the neurological to identify the impairment, but on the school's failure to add to that data from the wealth of information it had on the student's educational needs. OCR was concerned that the impact of the student's disabilities on education were not considered, thus undermining any §504 plan (how do we know what to provide if we don't know how the disability impacts the student's access to, or benefit from, the school's programs or activities?). See also, Summer County (TN) School District, 52 IDELR 83 (OCR 2009)(Evaluation found in violation of Section 504 as school looked only at a general doctor's statement); Vineland (CA) Elementary School District, 49 IDELR 20 (OCR 2007). ("A physician's medical diagnosis may be considered as part of the evaluation process. However, a medical diagnosis of an illness does not automatically qualify a student for services under Section 504.").

- 7. What if the only evidence of impairment is the parent's assertions? In a Pennsylvania case, the parent alleged that the student had asthma and was allergic to trees, pollen, molds, and peanuts. The sole evidence of the impairment was an email from the parent to the school making the assertion. The parent provided the school with no medical documentation or other information, and did not request accommodations. At school, the student showed no sign of impairment. Although she had a variety of visits to the nurse, the visits were for things like head lice, a stomachache, a headache, and a bumped head. She did not have excessive absences and her grades were good. The parent complained to OCR that the school failed to provide the student a FAPE by denying her a mold-free environment, but failed to present evidence of disability at school. OCR rejected the claim, determining that the parent did not prove problems at school resulting from allergies or asthma, and nothing occurred at school that would have put the school on notice of a need to accommodate. Thus, the school had no duty to evaluate. Note that part of OCR's analysis included a review of the school's maintenance records for the building and ventilation systems and a finding that the building met federal environmental standards. Littlestown (PA) Area School District, 39 IDELR 134 (OCR 2003).
- **8.** Why not just ask the parents to pay for the medical evaluation? Because that's a violation. Santa Rosa County (FL) School District, 110 LRP 48657 (OCR 2009). Despite evidence that the student had an impairment affecting his educational performance (teacher emails indicate that this student's was "the worst case of ADD" they had seen) and a Connor's rating scale showed the student's inattention fell in the "very significant" range on all three scales, the school placed the burden on the student's parents to follow-up with their physician. "OCR still finds that the School's policy of requiring a parent to arrange and pay for a physician's evaluation for children with ADD and ADHD is inconsistent with Section 504." As part of the corrective action steps, the District

agreed to revise its procedures "to ensure that any medical evaluation or other assessment deemed necessary by the District for purposes of determining eligibility under Section 504 will be provided at no cost to parents." See also, Rose Hill (KS) Public Schools, supra.

9. Note that medical diagnoses and data on allergies, asthma, and other physical impairments can be very important for determining both eligibility and services.

While the §504 regulations do not require formal evaluation instruments or medical diagnoses, this is an area where the school may want to have harder data upon which to base both the eligibility decision and decisions with respect to elements of the Section 504 Plan should one be required. Critical to the §504 Committee's determinations will be an analysis of the types of things that the child cannot be exposed to, the risk of harm arising from such exposure, and the intervention required should accidental exposure occur. When making eligibility and placement decisions for students with asthma, allergies, and other physical impairments, medical information (from the student's doctor or from a school evaluation) can be extremely important. *See for example*, the diversity of medical opinions on the severity of a latex allergy in *Smith v. Unum Life Ins. Co.*, 305 F.3d 789 (8th Cir. 2002), and debate over phenol sensitivity in *Kropp v. Maine School Administrative Unit #44*, 47 IDELR 36 (D.C ME. 2007). Some questions the §504 Committee will want answered include:

- •What environmental irritants, scents or foods are problematic?
 - -Are these things present at the student's school or on the bus?
 - -What about other schools in the district?
 - -Are some of these more problematic than others?
 - -What is the impact of physical activity/outdoor activity/re-circulated air?
 - -Are certain times of year or particular weather conditions more likely to trigger reactions than others?
 - -Is a brief exposure a problem? Is extended exposure necessary to trigger a reaction?
 - -Has the student ever suffered a reaction at school or on the bus? Do we know the details? (How was the reaction triggered, where, what was the student's response, how did the school respond, how long did the reaction last, did the student return to class?).
- •What kind of exposure causes the problem?
 - -Does it have to touch the student's skin or can he inhale the allergen or irritant?
 - -Does the student have to ingest the food to trigger a reaction?
 - -How far away must the student remain from the irritant?
 - -What precautions do the parents use at home? On vacation? In the community?
- •What will happen if the student is exposed to the allergen or chemical?
 - -Is there a risk of death or serious illness?
 - -What has happened before with exposure? Was a hospital visit required?
 - -How often has the student had a serious reaction?
 - -What does a reaction look like?
 - -How long does the reaction last? How long is the recovery time?
 - -Is an injection of epinephrine or some other substance sufficient to stop the attack/reaction?
 - -What else will need to be done in the event of a severe reaction?
 - -How much time does the school have to respond to the reaction?
 - -Has there ever been an exposure at school?

ADA case law has recognized the importance of medical information in making determinations on allergy and chemical sensitivity issues. **Do not be reluctant to conduct your own evaluation or to demand medical information, such as a list of specific allergens or irritants that affect the student.** As a rule of thumb, when demands for accommodations and services increase in cost and complexity, increasingly sophisticated evaluation data should support the demands.

E. To OCR, Section 504 rights matter as much as the services.

OCR's concern with respect to serving potentially Section 504-eligible students through RTI/early intervention or health plans rather than under Section 504 is the lack of procedural compliance and safeguards. See, for example, Tyler (TX) ISD, 56 IDELR 24 (OCR 2010)("In relying on an individualized healthcare plan and not conducting an evaluation pursuant to Section 504, the TISD circumvents the procedural safeguards set forth in Section 504."); Dracut (MA) Public Schools, 110 LRP 48748 (OCR 2010)("A significant distinction between serving the Student on a Section 504 Plan which references a Health Plan, versus a health plan alone, is that the Student without the Section 504 Plan does not have any of the procedural protections that he is afforded under Section 504."). A 2011 letter of finding from Virginia simply declares that when an eligible student has a health plan, he is receiving services under Section 504.

"The Division states there is no reference to a Health Treatment Plan in any part of the June 2009 IEP. There is only a reference of 'cool temps' on the testing accommodations sheet and documentation of the ice pack use in a daily log. Because the Division did provide some evidence that it was complying with the Health Treatment Plan in assisting the Student with body temperature regulation, OCR finds there is insufficient evidence of a violation of Section 504. However, OCR cautions the Division that, where any student with a disability has a health plan in place in order to address the impact of a disability, OCR considers this student to be receiving services under Section 504, whether or not the health plan is formally incorporated into an IEP or Section 504 Plan. Thus, the student's health plan is to be developed and implemented according to the requirements of Section 504, and the student and his or her parents are entitled to Section 504's procedural safeguards with regard to the health plan." *Prince William County (VA) Public Schools*, 111 LRP 49536 (OCR 2011)(emphasis added).

F. Some impairments will "in virtually every case" result in eligibility

Is there such a thing as an impairment that results in ADA/Section 504 eligibility for every person it afflicts? Prior to the ADAAA, both the Supreme Court and OCR concluded that such was not the case. See, for example, Bragdon v. Abbott, 118 S.Ct. 2196 (1998)(case-by-case eligibility determination required by the ADA); Vineland (CA) Elementary School District, 49 IDELR 20 (OCR 2007)("A physician's medical diagnosis may be considered as part of the evaluation process. However, a medical diagnosis of an illness does not automatically qualify a student for services under Section 504."). That position persisted for a time even after the ADAAA Amendments, as evidenced by the language in the Revised Q&A, #23, cited above.

The Post-ADAAA Approach. When the Equal Employment Opportunity Commission (EEOC) issued its final regulations implementing the ADAAA (with respect to employees), it took a different position. In light of Congress' desire that eligibility be viewed more broadly, together with the changes to eligibility (more major life activities, the addition of major bodily functions, a lower hurdle of substantial limitation, a new mitigating measures rule and special treatment for impairments in remission and episodic impairments), EEOC opined that some impairments, while not automatically resulting in eligibility, would virtually always result in eligibility.

Those impairments are: deafness, blindness intellectual disability, partially or completely missing limbs or mobility impairments, autism, cancer, cerebral palsy, epilepsy, human immunodeficiency virus (HIV) infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia. 29 C.F.R. §1630.2(j)(3). Although these are final EEOC regulations, they do not have legal authority with respect to K-12 Section 504 students, as ED retains jurisdiction to issue K-12 rules. (These regulations *do* apply to issues involving school districts and *their employees*).

Nevertheless, it appears that ED reviewed EEOC's position, and adopted it with respect to a small number of impairments. OCR's January 2012 guidance letter indicates that a handful of impairments will almost always result in eligibility.

"In most cases, application of these rules should quickly shift the inquiry away from the question whether a student has a disability (and thus is protected by the ADA and Section 504), and toward the school district's actions and obligations to ensure equal educational opportunities. While there are no per se disabilities under Section 504 and Title II, the nature of many impairments is such that, in virtually every case, a determination in favor of disability will be made. Thus, for example, a school district should not need or require extensive documentation or analysis to determine that a child with diabetes, epilepsy, bipolar disorder, or autism has a disability under Section 504 and Title II." 2012 DCL, p. 5 (emphasis added).

A little commentary: The ED position mimics the "virtually always" language of EEOC (ED says "virtually every case"), but lists fewer impairments than EEOC. Schools should be aware of the impairments in EEOC's lengthier list as individuals with impairments on EEOC's list, but not OCR's list, may argue for similar treatment by the schools.

G. Substantial Limitation Issues: Timing, Location, Severity, and Consistency of Symptoms

- 1. Temporary Impairments. A common (and common sense) question on eligibility is whether Section 504 requires schools to evaluate temporary impairments. The question arises from the recognition that some impairments are so temporary that it makes little sense to worry about eligibility and services since the student will likely recover from the impairment before the parent returns the request for consent for Section 504 evaluation. OCR provides the following guidance. "A temporary impairment does not constitute a disability for purposes of Section 504 unless its severity is such that it results in a substantial limitation of one or more major life activities for an extended period of time." Revised Q&A, Question 34. Hence, impairments that do not last "an extended period of time" would not create eligibility, and presumably, would not trigger the school's duty to evaluate. OCR continues "The issue of whether a temporary impairment is substantial enough to be a disability must be resolved on a case-by-case basis, taking into consideration both the duration (or expected duration) of the impairment and the extent to which it actually limits a major life activity of the affected individual." Id. See, for example, Robinson v. Morgan Stanley Dean Witter, 107 LRP 51588 (N.D. IL. 2007)("When exposed to fragrances or perfumes, Robinson may experience cold-like symptoms such as headache, stuffiness, shortness of breath, fatigue, sore throat, and other symptoms that may persist for as little as a few minutes or up to a week. Though Robinson may be temporarily restricted in her ability to perform activities such as breathing and seeing when exposed to perfumes or fragrances because her throat may become constricted and eyes water, the Seventh Circuit has held that 'intermittent flare-ups' do not establish that an impairment is a disability.").
- **2. Single location impact.** What if the impairment substantially limits breathing in only one setting? In an Illinois case, a student with asthma was denied relief on a variety of discrimination claims because while she experienced breathing problems at Guilford High School, her asthma did not affect her in other settings or in other schools. "She may have been substantially limited in her ability to attend classes at Guilford, but this location specific limitation was not a substantial limitation on a major life activity. She was physically able to attend school elsewhere." *Block v. Rockford Public School District #205*, 38 IDELR 36 (N.D. IL. 2002).

Does the impact of the impairment have to be felt at school? A pair of recent OCR decisions show a broadening view of where to look for impact on major life activities. *See for example, Hilliard City (OH) School District,* 110 LRP 67496 (OCR 2010)(resolution agreement requires school to consider "whether any particular physical or mental impairment substantially limits one or more major life activities, *not solely learning or the ability to function in the school setting*"

(emphasis added)); *Delaware City (DE) School District*, 110 LRP 66017 (OCR 2010)(resolution agreement requires that school "consider all possible major life activities, including operation of major bodily functions, *and will not restrict consideration to only such activities or behavior as is demonstrated during the school day"* (emphasis added)).

A little commentary: Does this resolution agreement language suggest an OCR position that the impact of the impairment outside of school and in noneducational activities can give rise to Section 504 eligibility at school (that is, a finding that this is a student with a disability?). How does that approach square with the notion that Section 504's protections prohibit discrimination on the basis of disability by the recipient or with respect to the recipient's programs and activities?

3. Severity of symptoms. One of the most difficult factors to address in the substantial limitation analysis is the risk of serious reaction. Many of the cases in these materials characterize the allergies, asthma, or sensitivities as "potentially life threatening." The §504 Committee, of course, should take that risk seriously, but it does not end the analysis. After all, a serious life threatening sensitivity to jet fuel, for example, may prove easy to address on most campuses where no such fuel is present. Other data with respect to the student's history can help the Committee.

Potential impact vs. present impact. "While C.R.S. could potentially have a very severe reaction under some circumstances, no such reaction has actually occurred over the course of her life. The record indicates that she had a strong reaction in 2001, another milder one following her first allergy shot, and a third in August of 2006. Moreover, no evidence indicates that these reactions substantially limited her ability to breathe when they occurred. Her most recent reaction involved only 'watering eyes' and a 'scratchy throat,' and the 'mild anaphylactic reaction' she experienced after the administration of her first allergy shot in 2003 was apparently only 'an itchy, welty rash.' Even before she began receiving allergy shots from Dr. Schneider, the record is basically void of references to C.R.S.'s allergies adversely affecting her ability to breathe. Such infrequent and relatively mild occurrences do not amount to 'substantial' limitations, and while C.R.S. has the 'potential' to have a more serious reaction, a potential reaction does not 'presently' limit her ability to breathe. Sutton, 527 U.S. at 482-83; see also Waldrip, 325 F.3d 652." Smith v. Tangipahoa Parish School Board, 46 IDELR 282 (E.D. LA 2006)(internal citations to record omitted).

4. Inconsistent symptoms & lifestyle. From time to time, patients are able to coerce or influence the letters that doctors write on the patient's behalf. Districts should then be sensitive to information received from a doctor that appears to ignore the obvious. An excellent example is on the issue of consistency in symptoms. Does the child who must be shielded from a wide variety of allergens at school (according to the doctor's letter) live a life at home that seems unconcerned with **exposure?** That is, what does the child do when he/she is not in school? Does he/she go to the mall, play outside or at neighbors' houses, go to church? Does the child play at the park or go to the zoo? If the child's life away from school is very different in terms of reaction to allergens, another issue may be present. A hearing officer's decision from Oregon is instructive. A.E. is a female student with, according to the parents, severe chemical sensitivities and allergies. Throughout the district's relationship with the student, the parents and student's physician were vague in identifying "what if anything within the school buildings was adversely affecting A.E." Salem-Keizer School District, 26 IDELR 508 (SEA OR, 1997). In response to the vague concerns, the district made considerable changes to the school building, installed fans, air filters, changed the types of chemicals, paints and cleaning supplies it used and the schedule under which it used them, and even built a "clean room" where A.E. could go to recover from exposure to whatever it was that bothered her. The district became suspicious when it noted the variety of activities A.E. was involved in outside of school, with no resulting physical reaction. "Apparently, she was not able to go just anywhere, but she was very capable of being around other people in settings which were seemingly much more polluted than various parts of the school buildings." The hearing officer summarized the suspicions.

"A.E. sometimes has symptoms, such as flushing, hives, headaches, fatigue and other allergic type reactions. She experiences or complains of these symptoms in some settings, and around some people some times, but not other times. She cannot cope with some physical surroundings such as the 'clean room' at SSHS but can be around friends and other students in social settings where smoking and fragrances are relatively uncontrolled. She has problems in some social settings but not others. She cannot go to some stores, but has little discomfort in others. She complains of being bothered in some new construction areas, but not others.... The impact that substances have on her varies to the extent that sometimes she will put up with them if it means she can do what she wants to do while on other occasions she wants to do something, but simply cannot. She is a very strong willed young woman, and pretty much determines her limitations and what she will and will not accept." *Id.*, at 513.

The hearing officer agreed that the inconsistencies were evidence that the disability was not what the parents would have the school believe. Further problematic was her rejection of tutors sent by the school to her home during periods when she did not attend school. The Hearing Officer believed that A.E. simply did not want to be subjected to the structure of school. "Keeping in mind that this is a very intelligent young woman, she also is very assertive, and, she sometimes informed her tutors that they did not pass the 'sniff test' and therefore they could not come into her home, that she did not want to take tests or respond to questions or be required to do certain assignments, or take certain subjects in the prescribed order, or for that matter take some classes which are required for graduation of all." *Id.*, at 511. In essence, A.E., with the help of her mother who also suffered from multiple chemical sensitivity, used an amorphous, confusing set of allergies or sensitivities as a school avoidance technique. While the Hearing Officer rejected the notion that the child qualifies under IDEA, he did find that she had a mental impairment qualifying under §504. According to the Hearing Officer, "That is not to say that her reactions are feigned. It would be more accurate to say that her responses to various environments are learned, supported and therefore legitimized by her personal belief system, influenced primarily by her mother and Dr. Green." *Id.*, at 514.

A little commentary: An obvious question when the facts don't add up is whether the allergy or sensitivity is merely an excuse for an individual's refusal to work or study. While consistency of symptoms is certainly a part of the eligibility analysis, resist the temptation to suspect that every child is a malingerer. Each case is different and must be evaluated individually. Of course, the student who claims asthma prevents him from participating in P.E. but plays on several sports teams outside, all year, in the heat, dust, pollen, etc., warrants a careful look.

II. Services and Accommodations for the Student with a Physical Impairment A. Some introductory thoughts on the school's duty to provide a Section 504 FAPE

Once eligible, how does the §504 Committee serve students with these impairments? While framed as a general question, the first answer should be that the Committee serves each student individually. Depending on the severity of the impairment, that can be very simple or very complex (including possible referral to special education). Importantly, OCR sees safety of the school environment as part of the school's duty under both §504 and Title II of the ADA.

"OCR interprets these provisions to require that public school districts take those steps necessary to ensure that the school environment for students with disabilities is as safe as the environment for students without disabilities. As the vast majority of district students without disabilities do not face a significant possibility of experiencing serious and life-threatening reactions to their environment while they attend District schools, Section 504 and Title II require that the District provide the student with an environment in which he also does not face such a significant possibility." Saluda (SC) School District One, 47 IDELR 22 (OCR 2006)(emphasis added).

That said, the level of services and accommodations required to meet the student's educational needs as adequately as the needs of his nondisabled peers are met, and to create a safe learning environment may depend on where the complaint is filed as the federal courts and OCR have different views on the level of required accommodations. The federal courts apply a reasonable accommodation standard to Section 504 and ADA Title II claims. *See, for example Southeastern Community College v. Davis*, 442 U.S. 397, 405 (1979)("Section 504 by its terms does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications to their programs to allow disabled persons to participate."); *Smith v. Tangipahoa Parish School Board*, 46 IDELR 282 (E.D. LA 2006) ("The record further supports Defendants' assertion that it is currently reasonably accommodating C.R.S. and that the additional accommodations requested by Plaintiffs are unnecessary and impractical."). OCR takes a different tact.

As a general rule, OCR rejects "reasonable accommodation" where FAPE is at issue. OCR on the other hand only applies a "reasonable accommodation" standard when analyzing the level of accommodations required for a student to participate in extra-curricular and nonacademic activities. However, when FAPE is impacted, OCR's position is that the word "reasonable" has no part of the analysis. *Letter to Zirkel*, 20 IDELR 134 (OCR 1993)("The key question in your letter is whether the OCR reads into the Section 504 regulatory requirement for a free appropriate public education (FAPE) a 'reasonable accommodation' standard or a similar limitation. The clear and unequivocal answer to that is no."). In other words, where FAPE is at issue, OCR has taken the position that even unreasonable (expensive, inconvenient or burdensome) accommodations are required of K-12 public schools.

B. Creating the §504 Plan: What must be done to maintain the student's health and provide equal access and benefit in the school's programs and activities?

Evaluation precedes eligibility, and precedes the delivery of services. The §504 regulations require that the school evaluate the student "before taking any action with respect to the initial placement of the person in a regular or special education program and any subsequent significant change in placement." 104.35(a). In other words, there are no initial services without an evaluation, nor changes in the services provided under §504 without a re-evaluation. The rational is quite simple: without data we do not know whether the student would be subjected to discrimination in the school's programs and activities (is he eligible?) nor would we know how to serve him (how does the disability impact his ability to access the school's programs and activities?).

Consider this approach during the Section 504 Committee's discussion of a Section 504 Plan for the student... Look at the medical and other data developed in the evaluation with respect to the school's demands on the student. For example, take the list of allergens or sensitivities presented by the doctor and walk the student's schedule of classes and school activities. Where does he go and what is he exposed to during the school day? This is the simplest and most effective way to determine where in the school building or school day the child is likely to encounter problems. Consider changes in the student's schedule or classroom assignments where possible to avoid triggers. Physical demands on the child from classes such as P.E., marching band, vocational/ag programs should be carefully considered. Once needs have been identified, marshal the resources of the campus and district to address the needs, including some of the following types of services and accommodations that might be required by a student with a physical impairment.

1. Services provided by the school nurse. Students with physical impairments may require services provided by a school nurse in order to access and benefit from the school's programs and activities. Services may include administering medication, monitoring the child's condition, proving nebulizer treatments, assisting with self-care, working with staff to understand and indentify health complications, or a variety of other services. Central to these efforts is the Health Plan. Typically, the health plan is created by the school nurse pursuant to procedures and forms provided by the state or district, in collaboration with the student's health care professionals and the student's parents. Whether by written orders, phone collaboration or face-to-face meetings, the student's medical

concerns are identified, and services, protocols and strategies are laid out to both maintain the student's health at school, and be prepared for a health emergency should one occur. *See, for example, Maine School Administrative District #40,* 29 IDELR 624 (OCR 1998)(OCR rejected a parent's complaint that the district was woefully unprepared in the event of a bee sting and a resulting severe allergic reaction, finding that the student and school nurse both had EpiPens available, the nurse had alerted all of the student's teachers to the sting sensitivity, and a contingency plan existed in case of an emergency.). A few issues with respect to nurses follow.

Does the student need full-time nursing services at school? It depends. In a Tennessee case, the parent removed a student with asthma from the school and threatened not to return the student until a nurse was present on the campus. The district refused to provide a nurse, but did contact the doctor in an effort to understand the student's medical needs. Specifically, the school wrote a letter to the doctor asking if a nurse was required to be present at school. The doctor responded by letter, writing that "he was not aware of any acute medical indication for keeping the Student home from school, and that it is reasonable to provide *nonmedical* personnel with appropriate training in the administration of her medications." *Murfreesboro (TN) City School District,* 34 IDELR 299 (OCR 2000)(emphasis added).

A little commentary: An important distinction when determining appropriate services is: "Parent-desired" vs. "Doctor-required." Evaluation data is the key to resolving these types of issues. A parent demand for an accommodation or service does not create a school duty to provide same under §504. The legal duty arises from the impairment, and the data (here, input from the doctor) helped the school to determine what the disability required as opposed to what the parent wanted (which was clearly much more than what the disability actually required). But see, Silsbee Independent School District, 25 IDELR 1023 (SEA TX. 1997)(Hearing Officer determined that the services of a registered nurse and the nurse's presence on the campus at all times was required in order for a student with a seizure disorder to benefit from education. The student had a history of grand mal seizures, coupled with drop apnea without warning. Serious brain damage or death could result from seizures where breathing stops for more than three minutes and is not restored.)

If a nurse is required for FAPE, must the school provide the nursing services at the home campus? Probably not. A Kentucky student with Type 1 diabetes required at least one insulin injection during the school day, which the student, due to her age, could not self-administer. In response to her parent's request that the school provide a nurse to administer the injection, the school indicated that no nurse was assigned to the student's home campus and no staff member was willing to administer the injection. After some investigation, the school principal offered to transfer the student to a neighboring school (within 5-7 miles of her home campus) and provide transportation. The court concluded that the offer was sufficient. Since there is no absolute right to attend a neighborhood school, "The Court is not persuaded that either the ADA, §504, or the KCRA [Kentucky Civil Rights Act] require school districts to modify school programs in order to ensure neighborhood placements when necessary services and a free appropriate public education are available at another site within the district." B.M. v. Board of Education of Scott County, 51 IDELR 5 (E.D. KY. 2008).

A little commentary: While the parent alleged that transportation to the neighboring school would result in the student arriving late to school and leaving early, the court notes "that there is no evidence of the actual impact that such transportation would have on B.M.'s instructional time beyond the S.M.'s bare assertions that it might take 30 minutes in the morning and 30 minutes in the evening." Of course, a significantly shorter school day due to transportation would seriously complicate this analysis. See also, Kevin G. v. Cranston School Committee, 27 IDELR 32 (1st Cir. 1997)("Thus, while it may be preferable for Kevin G to attend a school located minutes from his home, placement in Gladstone satisfies the Act. Gladstone, which is located only three miles from Kevin G's home, meets all his educational and medical requirements. The school district has an obligation to provide a school placement which includes a nurse on duty full-time, but is not required to change the district's

placement of nurses when, as in this case, care is readily available at another easily accessible school.").

But when a nurse is not required to provide a service, can the student still be moved to another campus where a nurse is located? No. See, for example, School Board of Pinellas County, 58 IDELR 59 (SEA FL. 2011)(where adults could be trained to administer insulin, the school cannot force students to attend another school where a nurse is present pursuant to school policy that only allows nurses to administer insulin.).

State laws and nursing practices or licensing rules will draw a variety of lines proscribing the types of services which nurses with various type of licenses (or lay-persons with varying levels of training and supervision by nurses) can perform. For example, the Texas Nursing Practice Act (Occupations Code Chapters 301-305) and its implementing regulations generally leave to the particular nurse's judgment the question of whether a specific task is within his or her expertise. See, for example, regulations with respect to licensed vocational nurses (LVNs) at 22 T.A.C. §217.11(a)(iv)(The LVN shall "utilize a systematic approach to provide individualized, goal-directed nursing care by... implementing appropriate aspects of care within the LVN's scope of practice") and §217.11(2)(C)(The LVN "[m]ay perform other acts that require education and training as prescribed by board rules and policies, commensurate with the licensed vocational nurse's experience, continuing education, and demonstrated licensed vocational nurse competencies." Further, state law may allow for students to self-test and self-administer medications under certain circumstances. (See, for example, TEX. EDUC. CODE §§ 22.052 (diabetes) and §38.015 (asthma).

A state law can make all the difference. Compare the following situations. In a Florida case, the school was not required to hire a full-time nurse to administer seizure medication where non-medical personnel trained by a school nurse could safely administer the medication in premeasured doses. *Collier County School District*, 110 LRP 7471 (SEA FL. 2009). State law created a different result in a California case. "[U]nlicensed school personnel are not authorized by current law to administer prescription injections of insulin to a diabetic student, even if the student requires such injections pursuant to a Section 504 or IEP Plan absent express statutory permission." *American Nurses Association v. O'Connell*, 54 IDELR 259 (CA. Ct App. 2010). The lesson is to determine the student's health care needs and consult state law to determine who on the staff has the required training or certification to meet those needs.

But we can't afford a nurse... In response to the demand for nursing services on a campus, the refrain that "we can't afford it" will typically not carry the day with OCR. See for example, Prince George's (MD) County Schools, 39 IDELR 103 (OCR 2003); Washington State School for the Deaf, 22 IDELR 987 (OCR 1995)("The lack of funds is not an adequate legal justification for not providing a student with needed related aids and services under Section 504 and for not providing an appropriate educational program."). The same argument was made, but apparently not supported by much evidence in the California case cited above. "The fact that there is generally a shortage of registered nurses in California and that there is a particular shortage of school nurses does not establish that a school needing to provide diabetic care to a student pursuant to a Section 504 Plan or IEP plan will be unable to locate and contract for the services of a licensed nurse[.]" American Nurses, supra.

A little commentary: Rather than try to argue poverty, perhaps the better response is to look to the medical data and state law to determine whether a nurse is actually required to provide the necessary services. At times, the parent is merely presenting a preference for the service provider, and the rationale for that preference is not medically-indicated. Where the parent's motivation is peace of mind, the school can address the concern through staff training (involving the parent) discussed below.

2. Adjustments to attendance policies. Without question, physical impairments can impact a student's ability to attend school. In fact, the impact of these impairments on school attendance may give rise to child find duties, and require §504 eligibility. For example, a junior high school student with severe allergies, asthma, and migraine headaches had a lengthy history of missing school due to her medical problems. In seventh grade, she was absent 132 times, and in eighth grade attended classes only three to ten times from September to November. The parents argue that the school failed to accommodate the student's absences. The only evaluations conducted by the district with respect to the child's absences were very recent attempts to find psychological causes, even though the district had been aware of the student's other medical problems for the past five years. OCR found that the district failed to properly evaluate given the information that it had on the medical-related absences. *Grafton (ND) Public School*, 20 IDELR 82 (OCR 1993).

As a general rule, Committees should look first to the impact (success or failure) of the school's regular attendance and make-up work policies to determine if they are effective in meeting the student's needs. If so, no additional accommodation would seem necessary. Where, however, there are significant absences and the student is unable to catch-up within an appropriate amount of time upon her return, the Committee ought to consider the provision of services while the student is at home, additional time to complete missed work, access to instructional staff for direct instruction on material missed during the absences, and other appropriate efforts to ensure that the student's needs are met as adequately as those of nondisabled peers.

But doesn't the student have to attend a certain number of days to get credit? In some states, class credit for graduation depends in part on meeting minimum attendance requirements. Typically, an exception is made for disability-related absences. In that context, be wary of requests that, as an accommodation, all absences be considered medical and excused. First, the typical campus or school district policy dictates what absences are excused and unexcused. Proper tracking of those days is extremely helpful to both \$504 Committees and IEP Teams as they try to determine the impact of the student's impairment and the need for services. Second, granting an automatic excused absence accommodation means that attendance can easily be avoided in the guise of absences that really are not medically-related. For example, consider the case of a parent keeping the student at home claiming a medical rationale for the absences, but refusing to provide the documentation required by campus policy. When campus efforts to get doctor's notes to verify the nature of the absences were continually frustrated, and the student was a close to missing the required number of days for truancy action, the campus contacted the student's doctor. The doctor assured the school that there was no medical reason for the student to be absent so extensively. The school filed for truancy and the parent filed with OCR alleging retaliation. OCR rejected the parent's complaint. Melrose (MA) Public Schools, 44 IDELR 223 (OCR 2005).

Makeup work. A common element in school absence policies provides the student who misses a day of school (as an excused absence) a specified period of time (typically one day for each day of excused absence) in which to complete makeup work upon the student's return to school. Some students will benefit from the policy and be able to return to class and makeup work under this arrangement. However, where a student already struggling misses instruction, mere makeup time may be insufficient to meet the need. Access to the teacher for direct instruction in the missed curriculum or other help may be necessary in addition to extra time to complete assignments. Note further that for some students, a §504 Committee's provision of additional makeup time can actually be counterproductive, as some students who already delay work completion may abuse the extra time and actually be further behind because they were allowed to do so. Exercise care and seek teacher input on this issue (does this student wait to complete assignments at the last minute, does he procrastinate large projects?) before adding time to the regular ed policy.

Shortened school day. The Section 504 plan for a student with chronic severe migraine headaches provided for an adjustment to the academic schedule in the form of half-day attendance until the headaches abated and the student could return full time. *Hudson (NH) School District*, 58 IDELR

- 22 (OCR 2011); See also, Scottsdale Unified School District, 38 IDELR 137 (SEA AZ. 2002)(Student received accommodations under §504 for ADHD and bipolar disorder including elimination of first hour class, presumably because of the impact of the student's medication on his ability to perform during the first hour class). These are not common accommodations.
- **3. Physical Education (P.E.) activities.** It is not uncommon for a student to provide the school with a doctor's note indicating that the student should not participate in any P.E. activities due to disability. While physical impairments can restrict physical activity in P.E., the broad prohibition is problematic, especially in grade levels where P.E. is a required part of the state curriculum. That activity is restricted is not the main concern, rather it is the broad scope of the restriction that is problematic in the context of §504's efforts to include students with disabilities in all school programs and activities. For example, in the commentary to the §504 regulations on nonacademic services, the U.S. Department of Education makes this statement. The §504 regulations "permit separation or differentiation with respect to the provision of physical education and athletics activities, but only if qualified handicapped students are also allowed the opportunity to compete for regular teams or participate in regular activities. Most handicapped students are able to participate in one or more regular physical education and athletics activities. For example, a student in a wheelchair can participate in regular archery course, as can a deaf student in a wrestling course." Appendix A, p. 380.

A little commentary: Rather than taking the doctor's total prohibition without question, schools ought to consider getting parental consent to talk with the doctor, and provide the doctor with a list of the physical activities that make up the P.E. class. Ask the doctor to identify with respect to each activity whether the student's condition allows him to participate, with or without accommodation (limited duration, weather considerations, etc). Absent this activity-specific analysis by the doctor, the all-too-common approach is simply to reject all P.E., especially if the parent is concerned about the student's participation in P.E. for non-disability reasons (dressing out, for example)

4. Transportation. With respect to transportation, the public school district's duty to Section 504 students is two-fold: equal access and a possible duty to provide transportation as a related service.

Equal access to regularly offered transportation. A qualified student with a disability under §504 should not be denied access to transportation a similarly situated nondisabled student can access. In other words, a student should not be denied transportation for which he is otherwise eligible because he is disabled. If the district provides bus transportation to students who live a certain distance from the school or who must cross a dangerous road to get to school, that service must be offered equally to disabled and nondisabled students who meet the eligibility criteria for regular transportation.

Transportation as a §504 related service: Section 504 provides transportation as a related service when the eligible child's physical or mental impairment requires the district to provide transportation services so that the student with disability can access education at the school. Even if regular transportation services are not available to a population of students (because they live too close to school or the school does not offer regular transportation, for example), a qualified student with a disability within that population may be entitled to transportation as a related service under Section 504. "Under Section 504, a recipient is required to offer transportation services in such a manner as is necessary to afford students with disabilities an equal opportunity for participation in such services and activities." *Whitman-Hanson (MA) Regional Sch. Dist.*, 20 IDELR 775, 779 (OCR 1993).

If the student does not meet the requirements for regular transportation, and does not require transportation in order to access educational services, there is no §504 duty to transport. Ossining (NY) Union Free Sch. Dist., 29 IDELR 73 (OCR 1998). In Ossining, the school had a policy of transporting students in grades K-3 if they lived more than a half mile from school, and students in grades 4-8 if they lived more than a mile from school. Parents of a fourth

grader who lost transportation upon completing the third grade argued a §504 violation. "OCR found that the District denied the student bus transportation because, in accordance with the District's policy, the student is in the fourth grade and resides less than a mile from the School. Additionally, the SEC [Special Education Committee] determined that the student does not require transportation due to his disability in order to access general education services." *Id.*, *at* 75. No violation was found.

What kind of impairments are we talking about? We're talking about any physical or mental impairment that prevents the student from getting to school or from benefiting from school if transportation is not provided. For example, a §504-eligible student whose asthma is aggravated by certain climates, seasons or temperatures may be unable to walk to school during certain times of the year without experiencing severe breathing problems. Similarly, a §504-eligible student who used to be able to walk to school but cannot do so now (due to broken leg or similar mobility impairment) may require transportation to school as a §504 related service. Note that in neither case would a special bus be required (unless the mobility impairment resulted in the temporary use of a wheelchair). Giving both students access to the regular bus (which they could not access earlier due to the short distance to school) is likely an appropriate accommodation. In short, mobility issues are not the only things to consider. *Donald B. v. Board of School Commr's of Mobile County*, 117 F.3d 1371 (11th Cir 1997). Asthma and allergies can also trigger the need for transportation.

§504 Committees should consider disability-related requests for transportation on an individual basis. "The group of knowledgeable persons is not required to provide transportation as a related aid or service simply at the request of the parent, but it must consider the request just as it would any other request, for related aids or services, and make a determination based on the individual educational needs of the student. OCR determined that the NYCDOE's practice of refusing to consider transportation services as a related aid or service, and requiring parents of disabled children to apply for a variance with OPT is in violation of the regulation implementing Section 504." New York City (NY) Department of Education, 49 IDELR 229 (OCR 2007).

Evaluation data indicates need for extra help on the bus. The student's doctor reported that an EpiPen had to be administered "expeditiously" following the student's exposure to peanut protein (whether ingested, touched or inhaled), and that should he have to wait for paramedics to be called and arrive to administer the EpiPen, "there is absolutely no way" he would survive. The Administrative Law Judge ordered that the school add someone to the bus to meet the need.

"Peanuts are a common food and people, especially children, who have eaten or contacted peanuts do not always wash or otherwise completely remove peanut proteins from themselves and it is almost impossible to make the school environment completely peanut-free. Therefore, it is probable that J.B., Jr., whether on a school bus or in class, will probably have some exposure to peanut proteins in his school day. A school bus driver, driving conscientiously, would not be able also to simultaneously monitor a severely allergic student and, if the student were to begin to experience an allergic reaction, expeditiously administer an EpiPen and, thereby allow the student to avoid the above-described problems. J.B., Jr., is too young to be responsible to monitor himself and to administer his own EpiPen. Therefore, a nurse, aide or other trained adult is required for those purposes." *Manalapan-Englishtown Regional Board of Education*, 107 LRP 27925 (SEA NJ 2007).

5. Counseling. Students with impairments, especially those recently-diagnosed, may need the assistance of the school counselor to address a variety of fears and concerns arising from the impairment. A student new to diabetes, for example, may be concerned about the now very-structured eating and blood testing schedule, the way he is perceived by his peers, and the pressures arising from his parent's fears about the impairment. Some of these concerns might also be addressed during visits to the school nurse.

- **6. Nonacademic and Extracurricular Activities.** Under §504, students with disabilities must be provided an equal opportunity to participate in extracurricular and nonacademic activities. The §504 regulations, at 34 C.F.R. §104.37(a), provide
 - "(1) A recipient to which this subpart applies shall provide non-academic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities.
 - (2) Nonacademic and extracurricular services and activities may include counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipients, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the recipient and assistance in making available outside employment."

Might the school be required to provide a trained aide & transportation for extracurricular activities? Yes. Williamstown (MA) Public Schools, 39 IDELR 43 (OCR 2003). OCR found a violation of §504 when a wheelchair-bound student with spastic cerebral palsy missed several chorus practice sessions due to the reassignment of a teaching assistant who had not yet been fully trained regarding the Student's needs. Around the same time, the Student was excluded from a class field trip because the District failed to plan for her transportation." Said OCR "Adequately trained aides and arrangements for transporting students with mobility impairments are two examples of ways of making nonacademic and extracurricular services and activities accessible to a student with a disability." See also, Fayette County (TN) School District, 38 IDELR 219 (OCR 2002)(Student was excluded from field trip due to missing the deadline for special transportation arrangements to be made. Since the rule was applied uniformly, there was no discrimination.).

Can a parent be required to attend a field trip in order for his/her student to attend? No. Oxford Hills (ME) School District, 57 IDELR 83 (OCR 2011). The student's attendance cannot be contingent on the parent's willingness to go on a field trip, as that would be a discriminatory prerequisite to field trip attendance unless every student was required to have a parent attend. Here, despite the parent's allegation, OCR finds that the school provided a properly trained employee to attend field trips with the student in case of need for assistance with the student's diabetes. No discrimination was found.

7. Faculty training serves several purposes. First, by understanding the types of triggers for a child's allergies or asthma, district personnel can hopefully foresee and prevent some attacks from occurring. For example, outdoor exercise in extreme weather conditions, or outside activities immediately after mowing or fertilizing may prove difficult for some students. When there is knowledge of the allergen's presence and the child's sensitivity, alternate activities can be planned. Second, campus personnel should know what an epileptic seizure, an asthma attack, and anaphylaxis look like. In the event that the student is unable to alert an adult to the escalating symptoms, district staff should be able to spot the problem. Third, once spotted, campus staff should know what to do. That may mean the need to assist with an injection, or getting the child to the nurse, or quickly calling for emergency assistance. The student's medical doctor can provide much needed guidance here, which should form the basis of the school's response as discussed previously in these materials.

Training & Parent Confidence. In a diabetes case, despite a requirement in the plan that the student's teachers would be trained to properly use and administer glucose gel/tablets, the parent alleged that two P.E. teachers appeared to lack the required knowledge— while they knew the gel was to be placed in the student's mouth, they were unsure exactly where in the mouth to place it. The parent provided them the appropriate instruction. *Hamilton Heights (IN) School Corporation*, 37 IDELR 130 (OCR 2002).

A little commentary: A parent who has been assured by the school that staff is appropriately trained to address the emergency medical needs of her child would likely be concerned when confronted with staff that don't seem sure about what to do. Staff training should be calculated not only to

provide familiarity with symptoms that mark an emergency and the materials or medications used in an emergency, but should also provide some appropriate level of hands-on response practice so that appropriate staff, in the context of a relaxed training, can discover for themselves where the gaps in their knowledge lie, and can resolve those issues in the training, rather than guess during an emergency. Clearly in this situation, staff who had been told how to do it (but had not tried the procedure) were not confident in their ability to respond. Note further that the procedure at issue was not terribly complex, and both P.E. teachers signed a document indicating they had been present at the training, but were unsure how to respond.

Who does the training? How complex should the training be? The parent may express a preference for a medical doctor or someone similar to provide the staff training. While the parent request should be considered, a medical degree will probably not be required to get the job done. As in other areas of the placement decision, the qualifications of the training and intensity or detail of same are matters for the committee to determine. For example, where a high school student's condition is typically quite stable and there have not been previous emergencies at school, less training likely is required than a situation involving a young student with frequent emergencies and little ability to recognize changes in his own condition. In short, the complexity of the student's condition answers these questions.

- **8.** When key employees are absent or unavailable... Unfortunately, the folks that know the student best aren't always around when an emergency occurs. Schools need to plan and prepare for that contingency. For example, while formal training had been provided to regular staff, a substitute aide assigned to assist a student with diabetes did not have formal training in preparation for the aide duty. She "did receive written instructions from the regular paraprofessional concerning the care of the Student on the days in question. The instructions were written on a copy of the daily schedule provided to the substitute that specifically named the Student and identified his teacher. The instructions stated that after recess he should be reminded to check his blood sugar and, at lunch, he should be asked if he input his reading into his insulin pump." OCR found no §504 violation as the student received the required service. *Millington (MI) Community Schools*, 49 IDELR 232 (OCR 2007); *See, also, Helendale (CA) School District*, 111 LRP 28314 (OCR 2010)(Following the failure of substitute teacher to accommodate a student with asthma who could not finish a multi-lap run, the principal directed classroom teachers to ensure that substitute teachers had students' medical information available in the classroom.).
- **9. But we informally address the problem already....** This is a common refrain from schools indicating that while concerned about the student's needs, they nevertheless feel a less formal response than §504 is appropriate. Unfortunately, informality, especially where the needs are complex, will not get things done consistently. In addition to the obvious (the school's duty to child find and evaluate eligible students, described above), informal help can prove to be inconsistent and, ultimately, *not real helpful*. A California OCR letter of finding provides an excellent example. The parent of a student suffering from ulcerative colitis complained that the school refused to address the student's needs in P.E. to prevent her from engaging in any activity that is physically jarring (such as running), and that the failure resulted in injury to the child. Said OCR

"The District did not identify the complainants' daughter as a student with a disability under Section 504. The District stated, however, that it had responded to the parent's request by notifying the daughter's teachers about the need to accommodate her physical condition. It is not clear whether all the parties shared the same understanding about the parameters of the proposed or offered accommodation concerning running. During the same week that these events occurred, the daughter's condition worsened, she was hospitalized and subsequently the term ended." Fallbrook (CA) Union High School District, 30 IDELR 985 (OCR 1995)(Emphasis added).

Not only did the school fail to properly evaluate for Section 504, the "informal" approach to addressing the physical needs was less than effective. See also, Bradley County (TN) Schools, 43

IDELR 143 (OCR 2004), where the student was never evaluated for Section 504, despite the school's provision of homebound services, tutoring and other assistance to educate a student due to serious injury from a motorcycle accident. The school argued that, despite the lack of evaluation, it had provided FAPE. OCR disagreed.

"But the fact remains that these evaluation and placement decisions were not made by a Section 504 review committee in accordance with the evaluation and placement procedures required by OCR's regulations. The purpose of these requirements is to assure that an informed decision is made as to a student's eligibility and need for services. As the District did not follow these procedures, there is no way to know if the services that were provided to the Student actually were appropriate."

C. Emergency Response

While Section 504 plans require individualized consideration of evaluation data to determine what each eligible student will receive, the following example is provided by OCR in *Saluda (SC) School District One*, 47 IDELR 22 (OCR 2006) to help school's recognize the elements that might be required in a Section 504 Plan for a student with peanut/tree nut allergies (PTAs).

- "1. Adequate policies, procedures and/or protocols governing PTA risk management in each type of School program and activity, including the Student's classroom and common use rooms (e.g., the cafeteria, library, computer labs, gymnasium, and art and music rooms), and during recess periods, bus transportation, field trips, and extracurricular, School-sponsored activities.
- 2. Sufficient emergency response policies, procedures and/or protocols covering all School programs and activities to address instances in which the Student is suspected of having a PTA-related reaction. These procedures should address the proper handling and administration of epinephrine in the event of an anaphylactic or other serious allergy-related reaction, and will identify the staff responsible for emergency responses.
- 3. A provision that all District staff responsible for the immediate custodial supervision or care of the Student (including substitutes) will receive comprehensive training on PTAs and the implementation of the Student's Plan. The Plan should establish when, how often, for how long, and by whom the training is conducted, as well as the content of this training.
- 4. A provision requiring that at least one fully PTA-trained staff person be at the School during all regular school hours and at all School-related activities attended by the Student who can administer epinephrine consistent with the District's PTA-related policies, etc.
- 5. Provisions setting out all of the PTA-related responsibilities of parents and students in all School programs and activities and an effective process for communicating their PTA-related responsibilities to them, and what sanctions are applicable to individuals who harass students with peanut allergies because of those allergies." Id.

Further, the Plan (or district policy, procedure or protocol) should include the following: "(1) the specific measures to be taken to protect the Student in settings other than his classroom, the cafeteria and during field trips; (2) procedures concerning the proper handling and administration of epinephrine in the event of an anaphylactic or other serious allergy-related reaction; (3) the staff responsible for emergency responses; (4) specifically who will receive training, the content of the training, who will conduct the training, or when or for how long it will take place; or (5) whether and, if so, what sanctions will be applied to individuals who harass students with peanut allergies because of those allergies." Id.

Now let's focus on some specific physical impairments and the unique issues they raise. These

impairments are highlighted due to the level of interest expressed from the field by way of questions. Note that many of the lessons learned from addressing one impairment can apply to other impairments as well.

III. Allergies, Food Intolerances and Chemical Sensitivity

The following background is provided to briefly describe the impairments at issue, their triggers, and things schools should consider in response. These are not exhaustive descriptions, but starting points for understanding.

Food allergies are a reaction of the body's immune system to a reaction-provoking substance, or allergen, in the food. The body sees the substance as "foreign" and fights it with antibodies. Eight foods—milk, eggs, peanuts, tree nuts (almonds, walnuts), soy, wheat, fish and shellfish—are responsible for over 90 percent of all food allergic reactions. International Food Information Council Foundation, pamphlet: Understanding Food Allergy, September 1998. According to the National Institutes of Health, approximately 5 million Americans, including 5-8% of American children have a true food allergy, Id. What can result from exposure? In most cases, the following symptoms are likely. The lips may swell, there may be stomach cramps, vomiting, diarrhea, skin problems (such as hives, rashes, and eczema), wheezing or other breathing problems. U.S. Food and Drug Administration, FDA CONSUMER, Food Allergies Rare but Risky, May, 1994 [hereinafter, "FDA".] The reaction can also be more severe. Anaphylaxis, a violent allergic reaction is also possible. Severe symptoms can appear in as little as 5-15 minutes, or can progress to the life-threatening stage over 3-4 hours. A severe reaction may be indicated by "difficulty breathing, feeling of impending doom, swelling of the mouth and throat, a drop in blood pressure, and loss of consciousness," FDA, supra. Ominously, as "little as one-fifth to one-fivethousandth of a teaspoon of the offending food has caused death." Id. A study published in the NEW ENGLAND JOURNAL OF MEDICINE in 1992 pointed to an interesting correlation between food allergies and asthma. According to that study of thirteen children who had suffered severe allergic reactions to food (from which six died, and the other seven nearly died), "Asthma, a disease with allergic underpinnings, was common to all children in the study." FDA, supra. Indeed, the FDA reports that patients who have true food allergies will likely have other types of allergies, such as dust or pollen. Importantly, "children with both food allergies and asthma are at increased risk for more severe reactions." FDA, supra.

Food intolerance. The United States Departments of Agriculture (USDA) provided this definition. "An adverse food-induced reaction that does not involve the body's immune system. Lactose intolerance is one example of a food intolerance. A person with lactose intolerance lacks an enzyme that is needed to digest milk sugar. When milk products are consumed symptoms such as gas, bloating and abdominal pain may occur." "Accommodating Children with Special Dietary Needs in School Nutrition Programs: Guidance for School Food Service Staff," USDA, Fall 2001 [hereinafter "Accommodating Children"], http://www.fns.usda.gov/cnd/Guidance/special_dietary_needs.pdf. See also, Yuba City Unified School District, 103 LRP 20254 (SEA CA. 2002)(For this student with lactose intolerance, "failure to adhere to a strict diet may result in brain damage, damage to eyes, liver, or kidneys, or death").

Celiac disease. In a New York case, a federal district court provided the following description of Celiac disease. Celiac disease "is a lifelong, digestive disorder affecting children and adults. When people with [Celiac disease] eat foods that contain gluten, it creates an immune-mediated toxic reaction that causes damage to the small intestine and does not allow food to be properly absorbed." *Paladino v. DHL Express*, 110 LRP 19572 (E.D. NY 2010); *See also, Brevard County School Board*, 109 LRP 56512 (SEA FL 2009)(Complications from gluten exposure due to Celiac disease included triggering seizures).

A. What should the school do to prevent exposure?

Consider the medical and other data developed in the evaluation with respect to the student's health needs and the school's demands on the student. The §504 Committee should seriously consider medical evaluation data as applied to the school settings. Take the list of allergens or sensitivities presented by the doctor and walk the student's schedule of classes and school activities. Where does he go and what is he exposed to during the school day? This is the simplest and most effective way to determine where in the school building or school day the child is likely to encounter problems. Consider changes in the student's schedule or classroom assignments where possible to avoid triggers. Physical demands on the child from classes such as P.E., marching band, vocational/ag programs should be carefully considered.

Maintenance and cleaning. Solvents and other cleaning agents can contain scents or other irritants that can trigger allergies in some students. Districts can reduce the possibility of exposure by rescheduling cleaning or maintenance activities (as was done in *Salem-Keizer, supra*), or as demonstrated in the *Wellesley* case (cited below), by scheduling a good, thorough cleaning prior to the student's attendance at school. Other precautions might include notice to student/parent prior to major maintenance or cleaning activities (and temporary reassignment of the student to prevent exposure), and investigating changes in products or materials used for cleaning in the affected school.

Hand-washing/wipes. When the student's allergies can be triggered by oils transferrable by touch, hand-washing becomes an important consideration. How often hands should be washed and whose hands should be washed are matters of the evaluation data. There should be a logical link between the requirement and the manner in which the student could be exposed to the allergen at school and school related activities. For example, a requirement that the class wash hands five times a day to protect a student with a peanut allergy would make little sense if the only opportunities for the students to contact peanuts are prior to school, during snack, and at lunch. On these facts, three hand-washing events per school day would seem appropriate. Likewise, where the student's allergies are not triggered by peanuts unless ingested, a hand-washing requirement seems unrelated to his needs.

Substitution of cafeteria foods. While most public school employees are aware of the existence of ED's Section 504 regulations, food service is an area where the jurisdiction of another federal agency has regulatory authority. Less well-known (at least to folks outside of food service) are the USDA's regulations and guidance on accommodating students' disabilities in the provision of meals at school.

In 1994, the USDA issued a guidance document entitled "Meal Substitutions for Medical or Other Special Dietary Reasons" FNS Instruction 783-2, Rev. 2 (USDA October 14, 1994) [hereinafter "Meal Substitutions"], to provide guidance on the USDA's Section 504 regulations, 7 C.F.R. Part 15b, and their impact on Child Nutrition Programs. The term "Child Nutrition Programs," as used by USDA, appears to include the following: National School Lunch Program, School Breakfast Program, Child and Adult Care Food Program, Summer Food Service Program, the Fresh Fruit and Vegetable Program, and, sometimes, the Special Milk Program (for schools not participating in the other Nutrition Programs). While the 1994 guidance is obviously quite old, it is still in force. The guidance explains that schools participating in the Child Nutrition Programs "are required to make substitutions or modifications to the meal patterns for those participants with handicaps who are unable to consume the meals offered to nonhandicapped participants." *Id.*, p. 2. The substitution or modification, as discussed below, may be required or could be discretionary.

Mandatory substitutions. "[W]hen in the physician's assessment food allergies may result in severe, life-threatening reactions (anaphylactic reactions) or the obesity is severe enough to substantially limit a major life activity, the participant then meets the definition of "handicapped person", and the food service personnel must make the substitutions prescribed by the physician." *Meal Substitutions, at 4, (emphasis added).* This is the language and mechanism utilized by USDA to determine a student with a disability under USDA's Section 504 regulations. Unless the student is

obese (as described above) or there is potential for anaphylaxis, the school is not required to substitute foods.

When is the substitution or modification discretionary? "Generally, participants with food allergies or intolerances, or obese participants are not 'handicapped persons', as defined in 7 CFR 15b.3(i), and school food authorities, institutions and sponsors are not required to make substitutions for them.... [schools] may, at their discretion, make substitutions for individual participants who are not 'handicapped persons', as defined in 7 CFR Part 15b.3(i), but who are unable to consume a food item because of medical or other special dietary needs. Such substitutions may only be made on a case-by-case basis when supported by a statement signed by a recognized medical authority. In these cases, recognized medical authorities may include physicians, physician assistants, nurse practitioners or other professionals specified by the State agency." *Id.*, p. 4 (emphasis added).

Is there any legal distinction between "medically required" and "parentally desired" food substitutions? Yes. At times, parent preference may favor diets or foods outside the mainstream, and requests may be made for the school to provide food choices respectful of those preferences. Under Section 504 and the ADA, parent preference is considered but does require accommodation. Should a particular diet be required by an impairment and the required level of risk is identified by a physician, the duty to accommodate is created with respect to school food service. When the diet is a preference or life choice, but not required by impairment, Section 504 and the ADA appear to create no duty to provide food choice consistent with the preference. Unfortunately, these preferences may arise from nonmainstream treatments for impairments, further complicating the analysis. See for example, Atkins School District, 4 ECLPR 180, 4 LRP 9860 (SEA AR 1999)(Parents of a student with autism adopted an "all white diet" (everything has been eliminated from diet "except white food such as turnips, potatoes, cauliflower, breast of chicken, but not including dairy products, wheat products and rice") to address the student's behaviors. In response to evidence from school staff on the child's lethargy and the child looking in the hearing officer's pockets and hands for food, the Hearing Officer questioned the dietary choice. "There is no way of knowing how well this child would have done this past year had the parents given the child an adequate diet...."). And finally, this bit of USDA language on parent preferences. "While school food authorities are encouraged to consult with recognized medical authorities, where appropriate, schools are not required to make modifications to meals based on food choices of a family or child regarding a healthful diet." Accommodating Children, p. 9, (emphasis added).

Neither school folks nor parents make the substitution choice. "School food service staff cannot decide what substitutions are appropriate for a given child. Food service staff should not choose the substitutions themselves because a child may be on a specific medication, which could interact in a negative way with a particular food item. Ideally, a list of appropriate substitutions should accompany the menus and the foods should be on hand on a regular basis. If such a list is not available, school food service staff must ask parents to obtain from the child's physician (or the individual who planned the child's menus) a list of those foods that may be substituted." *Accommodating Children, p. 30 (emphasis added).*

Cafeteria: the peanut-free table/zone. Schools addressing food allergies in the cafeteria begin with some basics. They typically designate a peanut-free table (or other allergen free-zone) where the prohibited food item is not to be consumed. The table is typically washed carefully at appropriate intervals, and the sharing of food is prohibited. For younger students, staff may inspect meals brought from home before allowing students to sit in the allergen free zone. Note that at least one federal court has indicated that while the zone itself is acceptable, forcing other students to sit there is not. See Molly L. v. Lower Merion School District, 36 IDELR 182 (D.C. PA 2002)(No §504 duty to provide alternative lunch room with forced attendance by nondisabled students for student sensitive to environmental noise and odors). Likewise, the need to prevent the student's exposure to the allergen may mean that some physical isolation is necessary. Consequently, there was no Section 504 violation when the school's

peanut-free table was not next to the table used by the student's classmates, but was next to another class of kindergartners. *Upper Dublin School District*, 110 LRP 37073 (SEA PA 2010).

It would be helpful for both the school and parents to share expectations as to what, exactly, is "peanut free." Consider *Plumas (CA) Unified School District*, 55 IDELR 265 (OCR 2010), where OCR determined that the school implemented the plan as it understood it (the school understood that "no nuts" meant no nuts would be used for activities or decorations in the lunchroom, and the school would provide a nut-free table) as opposed to the parent's understanding that no nuts would be present anywhere. Note that the student's allergist "did not recommend making the school or lunchroom peanut-free because he believed that the Student needed to learn, with the assistance of the school, how to avoid exposure to the allergen."

What's your school's protocol when a student forgets his lunch money? A kindergarten student with a severe peanut allergy was served the "credit lunch" provided to all similarly situated students—a peanut butter sandwich—when her funds on deposit in the cafeteria were insufficient to purchase regular lunch menu items. The child initially refused to eat the offered sandwich, but did so after being chastised by a lunchroom worker, and experienced an anaphylactic reaction. The Parents' attempt to sue the State of Maryland for negligence was rejected by the state courts on state law grounds. Pace v. State of Maryland, 58 IDELR 138 (MD Ct. App. 2012)

What if the zone is contaminated? Fix it. One or two instances of children at the same table as a student with a milk allergy drinking milk from open plastic containers rather than the cardboard containers required in the student's §504 plan were quickly rectified. These isolated implementation problems were not sufficient to deny FAPE. *South Windsor (CT) Public Schools*, 49 IDELR 108 (OCR 2007). *See also, In Re Cascade School District*, 37 IDELR 300 (SEA OR 2002)(Section 504 plan is appropriate despite five exposures to peanuts over 13 months).

Disability Harassment by vending machine? OCR determined that continued availability of peanut/tree nut products in school vending machines throughout the campus, nine months after the school's SST committee agreed to instruct the snack vendor to remove such products, created a hostile environment for a student with a severe peanut allergy. Although the campus principal engaged in a variety of efforts over the course of the year to correct the problem (placing signs on the machines, letters to the vendor, and meeting with the vendor, and finally, having the machines removed), OCR concluded such efforts "were neither prompt nor effective." *Catoosa County (GA) School District*, 57 IDELR 141 (OCR 2011).

Does an equivalent snack have to be equal in quantity? That is, do two Jolly Ranchers equal a bag of popcorn? A parent complained to OCR that the school violated Section 504 by only providing the child (who had a popcorn allergy) with two pieces of hard candy during a movie screening when the other children each received a full bag of popcorn. The parent argued that a comparable amount of snack was required. As the student's health plan specifically approved of the snack the school provided, and did not contain requirements "regarding the amount or comparability" of the snacks, OCR found no violation. *Porta (IL) Community Unit School District*, 50 IDELR 170 (OCR 2007).

Preventing exposure to gluten. To address casein and gluten sensitivities, a variety of approaches have been used. Schools have agreed through an IEP to provide food prepared without gluten and casein (Lowell Joint School District, 106 LRP 49430 (SEA CA. 2006); and sometimes parents have simply chosen to provide all the food the student needs to consume at school. In Re: Student with a Disability, 103 LRP 9817 (SEA VA. 2002). In a Maryland case, the student's school health plan required the school to provide "snack alternatives to accommodate his need for a gluten-free, casein-free diet." Wicomico County (MD) Board of Education, 107 LRP 40174 (OCR 2006). To prevent accidental exposure, a Missouri school purchased a separate freezer for gluten-free foods, kept refrigerated gluten-free foods on the top shelf of a refrigerator (sealed and labeled), and kept gluten-free dry goods in their own cabinet and in labeled containers. Henry County (MO) R-I School District, 52 IDELR 233 (OCR

2009)(Unfortunately, the school had previously served the student food products containing gluten on two occasions, resulting in serious illness and a violation of FAPE). *See also, Tolland (CT) School District,* 107 LRP 2140 (OCR 2006)(Groups using school facilities required to make available gluten free foods upon notice that student with allergy would be attending an event).

Voluntary scent-free or allergen-free policies. Some schools have responded to the problem of allergens by implementing voluntary policies that educate fellow students about the harmful substances and encourage them to comply by not wearing certain scents or bringing certain foods to school for the safety of a fellow student. *See for example, Maplewood (NY) School District,* 107 LRP 33561 (OCR 2006)(In response to claims that school failed to inform parents of other students in the class not to bring peanut products to school, the school resolved the issue by posting a sign on the classroom door advising parents and students not to bring peanut products into the classroom. Similarly, the school sent a letter home to parents with the same instruction.).

What about a mandatory scent-free/allergenic-food-free policy? At least one hearing officer has ordered a complete peanut ban in a classroom. In the case of a first-grader with a life threatening peanut allergy, the school had previously implemented a voluntary peanut ban. The school asked parents to refrain from sending peanut-containing products to school, required staff and students to wash their hands before and after eating, provided staff training on anaphylactic reactions, stopped supplying peanut butter lunches, created a peanut-free lunch table for the student and washed all tables and desks after meals. Despite the fact that the voluntary efforts had been successful (one exposure during the school year), the hearing officer found the accommodations inadequate and ordered the school to institute a complete ban on peanut products. He did not believe such a ban would fundamentally alter the nature of the school's educational program. The ban would, however, allow the student to interact with all students during lunch, and participate in all food-related activities, such as "Asian food night," which the student was unable to participate in due to the use of peanut products. The hearing officer also found that the inconvenience the ban would impose on other students was justified in light of the life-threatening nature of the student's peanut allergies. Mystic Valley Regional Charter School, 40 IDELR 275 (SEA MA 2004). Similarly, schools have agreed not to serve peanuts or peanut products in the school cafeteria, Cascade School District, 37 IDELR 300 (SEA OR 2002), Upper Dublin School District, 110 LRP 37073 (SEA PA 2010); and have taken action to prevent exposure from lunches brought to school by others, Summit County (CO) School District, 110 LRP 20111 (OCR 2009).

Latex ban. In response to an OCR complaint alleging that a student had been excluded from two school activities because of the use of latex balloons, the school entered into a resolution agreement banning the use or presence of latex in areas where the student will be involved in the school's programs and activities. Staff and other individuals responsible for the student's care and control will be made aware of the ban, and a procedure will be developed (with parent input) to ensure that PTA and other organizations conducting school-related activities that the student may participate in do not have latex present. *Omaha (NE) Public Schools*, 107 LRP 36147 (OCR 2006).

Data lessons from a demand for a "No Spray" Policy. Zandi v. Fort Wayne Community Schools, 112 LRP 48082 (N.D. IN. 2012). While a junior in high school, Josh began experiencing allergic reactions to "certain perfumes, fragrances, and lotions." His reactions ranged from mild rashes to facial swelling, tightness in the chest, and anaphylactic shock. An allergic reaction at school resulted in a five-day hospitalization. Josh finished his senior year in home-based education to avoid additional serious reactions. The litigation involves the school's refusal to implement a parent-requested "No Spray" policy. The policy would have prohibited, in writing, the spraying of fragrances in the building. While the school refused to adopt a written policy, it did take action to address the problem. The school, through emails to staff and morning announcements, encouraged students and staff to avoid the spraying of perfumes, and a school newspaper article was written to raise awareness of the student's predicament. Teachers and staff were on the look-out for individuals spraying perfumes, but none were ever found. The school also offered to allow the student access to the building through another entrance

to avoid the crush of students (and exposure to scents), a different arrival time at school, the ability to stagger his passing periods to avoid the throng of students and suggested Josh consider the use of a mask.

Summary judgment was granted to the school on Josh's discrimination claim as the school provided reasonable accommodations (remember, this is a district court case, not an OCR letter) and there was no evidence that a written policy would have made any difference.

"Although Josh suffered multiple reactions of varying degrees of severity, there is no evidence that anyone sprayed perfume inside the school. In fact, in some cases, Josh did not even smell perfume before a reaction. Without a medical or other expert opinion establishing that perfume sprayed in the building elicited a different reaction than perfume already sprayed on a person who enters the building, Josh cannot show that even an effective policy would have prevented his reactions from occurring."

Finally, the student does not remember seeing anyone spraying fragrances prior to any of his allergic reactions, and review of surveillance tapes by school personnel likewise do not evidence anyone at school spraying perfumes.

How can schools encourage cooperation by parents of nondisabled students? In order for either voluntary or mandatory bans to be effective, the school must secure the cooperation of other students and their parents. Cooperation may not occur without some school efforts to explain. For example, parents of students in a third grade class complained and questioned the efforts of the school to accommodate a classmate with a life-threatening allergy to nuts. The student qualified for special education as Other Health Impaired. On a daily basis, the school vacuumed classroom carpet, washed all classroom desks, required hand-washing by anyone entering the room and maintained the classroom food-free. Parents and students asked a lot of questions about the accommodations and why things were occurring. Generally, the tone was not hostile, although the parent of the student with allergies reported hostile looks, and "3rd grade parents unnecessarily calling her and being rude."

"In order for the classroom program to work effectively and result in a reasonably safe environment for the Student, the voluntary cooperation of other students and their parents was essential. Part of this process was an on-going dialogue and informational process. The other participants were being asked to alter their customary behavior in ways that were novel and restrictive of their personal preferences. It is reasonable that, without animus or a discriminatory purpose, they might question the necessity of the procedures they were being asked to follow.

Much of the behavior identified by the complainants represents reasonable inquiries on the part of parents and their children who were participants in the classroom to which Student was assigned. In many cases, the questioning by parents and students were made to Student's mother and her aide. It appears that this was done to avoid questioning the Student directly, in most cases.

The evidence shows that the District took reasonable steps to inform the affected students and their families as to the nature of the modifications to their educational environment and to explain the necessity for the changes. When it appeared that additional information was required, the District provided forums to supply information, in a manner consistent with the voluntary nature of public education and the District's legal obligations under Title II and Section 504."

These inquiries and communications from parents were not harassment. *Pacific Grove (CA) Unified School District,* 47 IDELR 138 (OCR 2006). For some Section 504 Plans to work, the cooperation of others is required. In those instances, the school must develop strategies to educate and encourage cooperation in order to achieve the required compliance.

What if the parent demands a private school placement for her student with an allergy? The parent of a nine-year-old student with a latex allergy demanded the student's placement in a private school because Memorial, the public school where the student would attend next year, utilized tires containing latex on the playground, and the parent was concerned that students would bring items containing latex with them into class. The parent had expressed similar concerns at Memorial (unsuccessfully) with respect to the student's older sibling. The student was special education eligible, presumably on the basis of ADHD. At hearing, the school nurse at the student's current school (Valley View) testified that the student had never in three years had an allergic reaction at Valley View (including after school and extracurricular activities) even when he brought a latex ball from home that caused a serious reaction in an aide with a latex allergy who was serving on the campus. The nurse at Memorial testified that all was ready for the student: the staff had been educated about latex and EpiPens (orally and in writing), latex-safe signs had been posted and only latex-free products were ordered. Procedures were created carving out latex-free zones on the playground and ensuring that students touching tires would wash hands at the end of recess. The Hearing Officer concluded that Memorial was appropriate, and could provide a FAPE. Middleton School District, 46 IDELR 298 (SEA N.H. 2006).

A little commentary: A significant issue in this case was a communication/trust problem between the parent and the principal. Said the hearing officer, "The mother cannot communicate with the principal and the principal does not believe that the Student has the allergies in question. The mother believes the principal wants to purposefully expose the Student to latex to prove that there is no allergy."

If extreme measures won't protect the student at school, consider alternatives. From time to time a district may be exposed to the type of allergy allegations made in the *Salem-Keizer* case. There, the Oregon school district went to incredible lengths to provide a virtual bubble environment (a "clean room") for the student at school. While the clean room proved much more than what that child actually needed, a rare student will present himself to the district with severe allergies or sensitivities, and demand serious modifications in order to participate at school. When faced with a child whose sensitivity to allergens is that "exquisite" or the sheer number of allergens which can trigger an attack make the school a risk to the student's life, education at school is likely not the answer. Consider the possibility of a homebound or distance learning program of some kind. If the school cannot accommodate away the risk of death to a student from minimal exposure to common allergens, it seems unlikely that the school setting, even with accommodations, can be the least restrictive environment for that child. This notion is supported by OCR's finding in *Montgomery County, supra*. One of the parent's arguments was that in response to their concerns about the child's exposure to chemicals, the district removed him from his regular world history, P.E. and art classes without providing him with equivalent alternative instruction.

"We find that the District took reasonable steps to ensure that the student was provided with educational opportunities that were as effective as those afforded students without disabilities and that he be educated with students without disabilities to the maximum extent appropriate to his needs. The District, in an effort to enable the student to be educated with students without disabilities, took a number of steps to remove the offending chemical from the classroom environment, including opening windows, installing fans and permitting him to change seats. Only after those steps proved to be unsuccessful was the student removed from the classrooms in question." *Montgomery County (MD) Public Schools*, 31 IDELR 84, 319 (OCR 1999).

If the student's needs cannot be met in the regular classroom, even with accommodations, a more restrictive setting may be needed.

Moving the student to another campus. If the student's allergies are so exquisite that the campus cannot remove enough of the irritants or cannot control the irritants, offering the student an education at another campus within the district is certainly appropriate. For example, parents of a high school student with asthma and acute sensitivity to a variety of substances including dust, mold, chalk dust,

perfumes, and carpeting alleged that placement at the carpeted high school with a large number of students was inappropriate, and demanded placement in a *private* high school with air pure enough to prevent the child from needing medication. The parents presented the school with two medical evaluations, which were duly reviewed by the §504 committee, along with the various placement options. The school had conducted its own medical evaluation, and had various observations of the student, together with written reports from the school nurse, and the student's medical records. On review, OCR found no violation as information was drawn from a variety of sources and was appropriately considered. OCR also noted that the high school would be experiencing a major overhaul and cleaning during the summer prior to the student's attendance, and that the district would monitor the air quality at the school. If the student were physically unable to attend there, the district would place her in an *uncarpeted public* high school in the district. *Wellesley (MA) Public School,* 20 IDELR 1351 (OCR 1993). No violation was found. *See also Litchfield (CT) Public Schools,* 39 IDELR 244 (OCR 2003)("[I]f LHS cannot be made usable for the Student, the District will consider other high school locations for her.").

B. The school's response when the reaction occurs.

Districts should makes plans for responding to an allergic reaction/asthma attack emergency as part of the §504 process for eligible students, and as part of the campus or district emergency medical procedures for non-qualifying students. Utilizing the available medical information, the district may find that the student is to use epinephrine in case of a reaction. "Epinephrine designed for emergency home use comes in two forms: a traditional needle and syringe kit known as Ana-Kit, or an automatic injector system known as Epi-Pen." *FDA*, *supra*. Part of the district's response should include quick access to the EpiPen or an injection available at the nurse's office, and making emergency medical services available as needed. Texas law on student's carrying anaphylaxis medication is summarized below. Should hospitalization be required, a contingency plan for the student to makeup missed work should be considered (additional thoughts on response issues are provided previously in these materials).

IV. Asthma

Asthma is a swelling of the tissues in air passages of the lungs that hinders breathing. Typical symptoms include wheezing, shortness of breath, and coughing. **Asthma affects 10 million Americans (roughly 3-4%).** Asthma attacks can be triggered by many different factors: upper respiratory infections, weather changes, allergens (dust, mold, pollen, animals and, occasionally, food), exercise, environmental irritants (cigarette smoke, auto exhaust, smog, cleaning agents), emotions, early morning, sulfites, and certain medications. *International Food Information Council Foundation, pamphlet: Everything You Need to Know About Asthma & Food*, August 1997. Both asthma and allergies are physical impairments.

No asthma-related need for transportation. "It is clear that it is inconvenient for the parent to bring the student to school. However, no testimony indicated that he had a medical or other disability which would require transportation." The student lives within 6 blocks of the school, thus not qualifying for regular transportation available pursuant to school policy for students outside a 1.5 mile radius from the school. His IEP team at the March 21, 2006 meeting determined that transportation would not be needed as a related service. The parent did not bring any testimony indicating otherwise. While the student "has a nebulizer at school for asthma, however, he only used it at the request of the parent during a short period. He was never observed having difficulty breathing, even after strenuous activity." No transportation was required as a related service. *Lincoln Elementary School District 156*, 47 IDELR 57 (SEA IL 2006).

Can students carry their own asthma meds? A Texas district had a policy that all medications intended for student use were to be kept in the school nurse's office. Students were allowed to carry medicines to and from school, but once at school, the medications had to be turned over to the nurse. After being suspended for three days for violating the policy by keeping her prescription asthma inhaler with her

while at school, the student's parents complained to OCR. OCR found that she was not discriminated against on the basis of disability, as a nondisabled student committing the same misconduct was also punished (receiving 60 days in the AEP). OCR made a point of stating that the student's asthma had not been determined to be substantially limiting (although her dyslexia did qualify her). Why, and more importantly, whether, the distinction was important to the application of the policy is unclear from the decision. *North East (TX) ISD*, 31 IDELR 217 (OCR 1999). Presumably, if the student's medical condition is so severe that seconds count, an exception to the policy may be warranted. The school could also address that issue by having the meds available in the child's classroom, under the care of the teacher. The student's asthma did not seem that acute or dangerous in this decision, so the issue was not addressed.

A voluntary scent-free policy to address asthma. Stephanie was a fifth-grade girl suffering from life-threatening asthma triggered by various scents. To accommodate her needs, a private parochial school instituted a voluntary scent-free environment in her classroom. Pursuant to the policy, the girl's teacher and classmates agreed not to wear scents. When the parent demanded a mandatory scent-free policy, the private school refused further services. The parent sued. *Hunt v. St. Peter School*, 26 IDELR 6 (W.D. MO 1997). The Court found that Stephanie was eligible under §504. She had a physical impairment—asthma—that substantially limited the major life activity of breathing. According to her doctor, the asthma was "life-threatening" and Stephanie "should avoid all reasonable contact with respiratory inhalants such as perfume, strong odors, scents and diesel fumes." The court noted that she has been hospitalized repeatedly due to the severity of her attacks and she continued to take medication.

The voluntary policy was quite effective in protecting Stephanie. Following an education session by Stephanie's mother for the child's teacher, classmates and their parents, there was a high level of compliance. Stephanie was only exposed to people wearing scents three times during the year. As a result, Stephanie did not have to leave school or be picked up by her mother during her fifth grade year due to asthma. (See interesting factors, below). Despite the success of the voluntary plan, the parent was upset at the application of the school's infectious disease policy to Stephanie as a response to the school's inability to get information from Stephanie's doctor, and the school's desire to have a team of professionals consider appropriate responses to Stephanie's needs. The parent became angry over the use of the policy, feeling that it stigmatized her daughter. In a subsequent meeting, Stephanie's doctor informed the school that her asthma was life-threatening and that a mandatory scent-free environment was now required. The school refused the request, believing that its voluntary policy was appropriate. The district court found that the voluntary policy was sufficient for a non-public school under §504 as it enabled Stephanie to attend despite her asthma. Nothing more was required of the private school under §504. Some interesting factors in Stephanie's case:

- 1. Result-oriented disinformation from parent to doctor. The court noted that in an effort to sway her doctor's opinion, the parent informed the doctor that she had to retrieve the child from school on four occasions because of exposure to perfume worn by students at school. The judge noted that the dates the parent provided to the doctor included three days when Stephanie did not attend school at all, and a fourth day when Stephanie was actually in school all day. The lesson: doctors can be influenced to temper their reports, judgments and demands based on parental information (or disinformation as the case may be).
- 2. Parent refusal to let the doctor and the school communicate with each other. Despite demanding services from the school on the basis of her doctor's reports, the parent steadfastly refused to allow the school to talk with the doctor by phone. Any communication to the Doctor had to be in writing and approved by the parent. It was not until two years after the parent made a demand for services (and shortly before the suit was filed) that the school met with the doctor. As a result, all information provided to the doctor was filtered through the parent.
- **3.** The voluntary policy worked. Just because a voluntary policy is not a mandatory ban does not mean that it cannot provide a level of protection that might be sufficient for some students. Where

current efforts are appropriate, it would seem that no additional services/accommodations are justified, nor is a move to a mandatory ban justified.

What about serving the student at home? As a general rule, educating a student at home is a disfavored placement under federal disability law, as education occurs in a setting that generally does not allow access to nondisabled peers. The 9th Circuit summarized the rule nicely. "Hospitalized and homebound care should be considered to be among the least advantageous educational arrangements [and are] to be utilized only when a more normalized process of education is unsuitable for student who has severe health restrictions." U.S. Department of Education, *Program Standards and Guidelines for Special Education and Special Services, Programs and Services for the Orthopedically Handicapped and Other Health Impaired, aqi, Department of Education of Hawaii v. Katherine D., 727 F.2d 809, 818 (9th Cir. 1983), <i>cert. den'd*, 471 U.S. 1117 (1985). Where a student is restricted to the home due to the impact of allergies, asthma, or chemical sensitivity (or other impairment) §504 may require the school to provide educational services at home.

V. Diabetes

"Diabetes is a group of diseases characterized by high levels of blood glucose resulting from defects in insulin production, insulin action, or both. Diabetes can be associated with serious complications and premature death, but people with diabetes can take steps to control the disease and lower the risk of complications." American Diabetes Association, *National Diabetes Fact Sheet*, (no date). According to data compiled by the American Diabetes Association for 2002, 18.2 million people or roughly 6.3% of the population of the United States has diabetes. Of that number, some 5.2 million people are undiagnosed. With respect to youth, approximately 206,000 people under the age of 20 have diabetes, representing about .25% of the age group. *Id*.

A. Virtually always eligible.

The most critical reminder from the previous pages is that diabetes is one of the four impairments identified by OCR as "virtually always" resulting in a student's determination as a student with a disability under Section 504.

B. Testing blood sugar and administering insulin and glucagon

Testing blood glucose levels. A critical element of diabetes control is the periodic check of blood glucose levels. For older students in states with self-carry, self-medicate laws, staff intervention is probably not required to accomplish this task. For younger students, assistance will likely be required. Who will test, where testing occurs and how often testing is to occur are matters for the committee to determine, based on data from a variety of sources, which should include information from the student's doctor.

How can you determine whether a student can self-test for blood glucose levels in the classroom? OCR approved the following language with respect to self-testing by a student with diabetes. "In this agreement, the District acknowledges its understanding that, under Section 504, the issue of whether a student with diabetes may self-test in the classroom is a related services issue that requires an individualized determination by a group of persons knowledgeable about the student, the meaning of the evaluation data and the placement options. This determination must be based on the needs of the particular student and a careful review of information from a variety of sources." Springboro (OH) Community City School District, 39 IDELR 41 (OCR 2003). See also, Prince George's (MD) County Schools, 39 IDELR 103 (OCR 2003)(School policy allows students with diabetes to self-test for blood glucose levels in the classroom upon request.).

Note further that state law frequently will provide a mechanism for students to self-test and self-medicate under certain conditions and with doctor and parent approval. *See, for example, TEXAS HEALTH & SAFETY CODE, Sec. 168.001, et. seq.*, establishing rules for students to self-carry and self-medicate for diabetes at school following physician approval (discussed below).

But some kids need adult help. In a case from Maine, the parent objects to the school district's requirement that the student test blood glucose in the nurse's office every three hours, rather than be allowed to self-test as the student does at home. Parent alleges that the result of testing in the nurses' office is that the student is deprived of instruction that is not compensated. The school feels that the nurse must be involved in the testing as the glucose meter is subject to unreliable readings and the student's evaluation data indicates that the student has low average cognitive skills, resulting in school concerns that she needs to be supervised. Additionally, the school is concerned about the risks to other kids arising from unsupervised testing. OCR found that the time the student spent in the nurses' office was minimal and did not interfere with her classes. OCR dismissed the complaint. *Wells (ME) Public Schools*, 36 IDELR 244 (OCR 2002).

Concerns over lost instructional time. Parents of a student with diabetes and a peanut allergy were concerned about the amount of time the Student was out of class when she was being tested in the nurse's office. The Student was required to leave class as many as four times each day, resulting in up to an hour per day spent out of class. The parents were not persuaded by the "teacher's assurance that she did not teach when the Student was out of class." To address the issue, the school will test in class twice a day, and in the nurse's office twice a day when the student's schedule brings her close to the office. *Shelby County (TN) School District,* 108 LRP 68122 (OCR 2008).

Administering insulin & glucagon. When blood glucose tests out of the appropriate range, it may be necessary to administer insulin (if too high) or glucagon (if too low) to regulate the levels. Statistics from the American Diabetes Association on adults with diabetes (no data was available on youth) indicates that "about 12% of adults with diabetes take both insulin and oral medications, 19% take insulin only, 53% take oral medications only, and 15% do not take either insulin or oral medications." Amer. Diabetes Assoc., *National Diabetes Fact Sheet*, (no date).

It's a policy thing. We don't do injections. Wrong. OCR determined that a district policy prohibiting health services staff from giving injectables to diabetic students, "even if needed and even in emergency situations" could have the effect of denying needed services to students with disabilities. OCR required the District to revise the policy, ensuring that no student with a disability is denied needed services. *Prince George's (MD) County Schools*, 39 IDELR 103 (OCR 2003).

Can the school require the parent to administer meds to a student with diabetes? Only in rare instances. The parent of a student with diabetes initially desired to administer medication to her student herself, believing that school personnel, despite being willing to administer the meds, were incapable of doing so. OCR determined that the parent could make the decision to administer herself, but the school could not normally require that result. "Clearly, under normal circumstances, it is not appropriate for a school district to require a student's parent to come to school to provide medication that is a related service that the student needs during the school day in order to participate in the District's programs and services. If a parent were to insist that he or she provide such medication, however, neither Section 504 not Title II would preclude the district from agreeing to this method." Upon further reflection, the impracticality of the parent administering meds at school on a daily basis probably resulted in the parent changing her mind. When she then asked the school to begin administering the meds, the school refused. The rationale for its refusal, which was supported by OCR, was the parent's failure to provide "a prescription or other written instructions from the student's doctor on how and when to administer humalog and glucagon." OCR concluded that the District's response was appropriate, as was the school's promise that upon receipt of the requested information from the parent, it would administer the meds. Rock Hill (OH) Local Schools, 37 IDELR 222 (OCR 2002).

C. Food and Snacks

Dietary information on cafeteria lunches. In an effort to allow the student to participate in school lunches, the §504 Plan required the school to provide to the parent a carbohydrate count on all food items that would be served in the cafeteria for the school year. To meet the requirement, the cafeteria manager relied on information received in the form of a software program from food service vendors. Unfortunately, serving sizes and counts of items required to be mixed with ingredients other than water (like cakes and brownie mixes) were confusing. No designation was made for the carbohydrate count of those items when prepared, only when purchased dry and not mixed. The school discovered the problem and resolved it during the fourth week of school by re-visiting the issue with food vendors, and use of a manual provided by the vendor which produced more accurate counts. OCR found no §504 violation for the error. *Hamilton Heights (IN) Sch. Corp.*, 37 IDELR 130 (OCR 2002). Similarly, in a California case, the parent of two high school students with food allergies complained to OCR that her students were unable to eat school lunches due to concerns over "unknown ingredients." The case was resolved by the school providing a food lists (identifying component ingredients) "so that the students could be knowledgeable about what food they could eat at school." *Sonoma Valley (CA) Unified School District*, 49 IDELR 76 (CR 2007).

Another twist on carbohydrate counts. In response to the parents' request for the lunch menu with the carbohydrate counts of meals served each day of the school year, the school responded by providing the menu for a single month, upon which was written calculations of the carbohydrate count for the meals served each day of the month. The District indicated that since the same meals are provided each month (apparently on different days or in different patterns) the single month menu provided the data for the entire year. OCR did not find a violation. *Springboro (OH) Comm. City Sch. Dist.*, 39 IDELR 41 (OCR 2003).

Access to a microwave? Nope. "The request to heat up J.M.'s homemade food represents the archetype of a preferential, as opposed to a necessary, accommodation. After his diagnosis, J.M.'s parent made the reasoned decision, in collaboration with J.M.'s hospital nutritionist, to send homemade lunches to school at least until he became more acclimated to his condition in order to more strictly monitor his diet. Although J.M.'s lunches were homemade, there is no evidence to suggest that he was excluded in any way from eating his homemade lunch with other non-disabled peers during the lunch period. Diabetics do not require hot food and no such claim is made here." A.M. v. N.Y.C. Department of Education, 112 LRP 3144 (E.D. NY 2012).

Snacks on the bus & backup to school nurse. In an OCR decision from Pennsylvania, the District made a variety of commitments to resolve a complaint brought by the parents of a student with diabetes. Agreements covered the availability of snacks in the classroom, increased access to the restroom, and changes to the District's process for administering medication. The allegations, if true, painted a fairly ugly picture of the school. For example, the parents alleged that their high-school age student was "searched for snacks" in front of his classmates, and was charged with violating compulsory attendance laws despite the fact that the absences at issue were related to disability. Further, the parent questioned the accuracy of the attendance records as one of the absences claimed by the school was for a Sunday.... While little detail of the District's agreement was printed in the decision, significant were the District commitments to designate a backup person to the school nurse who could administer glucagon when necessary, and the agreement to send a memo to the third party bus company that provided transportation to district students, notifying them that the student must be permitted to eat snacks on the bus. A final, and somewhat mysterious, concession was the District's promise to provide the parent with a copy of the procedural safeguards. How the parent found OCR and managed to complain without a copy of the safeguards is not discussed. Jamestown Area (PA) Sch. Dist., 37 IDELR 260 (OCR 2002).

Nondiscrimination issue: If you give the class a cookie... In a strange twist of common sense, the parent of a student with diabetes (the same parent who did not trust the school to properly administer meds) argued that the classroom teacher discriminated against her student on the basis of disability by

not allowing her to have sugary treats when such treats were provided to every other child in the class. The teacher's response was appropriate (and made more sense than the complaint). "The student's teacher advised OCR that she always gave the student the same treats as her other students, except for those occasions when the student's blood sugar level was high. On these occasions, the teacher indicated that the student would still receive the treat, but she would give it to the [Parent] to give to the student directly as she deemed appropriate." [bracketed material added by author.] *Rock Hill (OH) Local Schools*, 37 IDELR 222 (OCR 2002). No violation was found.

D. The American Diabetes Association Model Section 504 Plan.

The American Diabetes Association provides a great deal of useful information and guidance to parents and schools about the impairment itself and possible school interventions to assist students with diabetes to access and benefit from public education. In those efforts, the Association provides a model §504 plan. On the top of the plan, the Association clearly and carefully indicates that the plan lists a broad range of things that might be needed. Unfortunately, some parents miss this crucial language on the Model Section 504 Plan:

"NOTE: This model 504 Plan lists a broad range of services and accommodations that might be needed by a child with diabetes in school. The plan should be individualized to meet the needs, abilities, and medical condition of each student and should *include only those items in the model that are relevant to that student*. Some students will need additional services and accommodations that have not been included in this model plan." (emphasis in the original).

[http://www.diabetes.org/assets/pdfs/schools/504-plan.pdf] The §504 Committee should be aware of this language and remind parents, where appropriate, that not all of the sample plan's provisions are necessary for each student, and that excessive accommodation can deny the student the opportunity to acquire new skills or deny access to necessary instruction.

E. Assorted Issues

- 1. Emergency plans. An emergency medical plan should be considered for students with diabetes. The plan should address staff training to prevent an emergency (assisting staff in recognizing warning signs of a medical emergency and appropriate interventions) and how to respond should an emergency occur. For the 504-eligible student, the plan should be created by the 504 Committee based on data received from the student's medical doctor, parents, teachers, the school nurse, transportation folks and others who will have responsibility for the student during the school day. Once developed, the plan should be given to those with implementation responsibility and an individual identified to answer questions about the plan as they arise. Periodic training with respect to the emergency plan should also be seriously considered.
- **2. Absences and time away from school tasks due to disability.** Students with diabetes may have additional needs to access **water fountains and restrooms**, and may spend portions of the school day in the nurse's office or other locations to conduct blood glucose testing and receive medication. These students may also have absences related to medical visits or sick days resulting from complications due to disability. Section 504 Committees should carefully consider the application of school makeup work and absence policies to ensure that the needs of the students are met appropriately. See, for example, East Allen (IN) County Schools, 38 IDELR 75 (OCR 2002); Shelby County (TN) School District, supra.

Is unlimited water fountain access the only solution? *North Lawrence (IN) Community Schools,* 38 IDELR 194 (OCR 2002). A common problem encountered by schools is a disability related need, and a parent's strong preference for a particular accommodation to address the need. In this case, the student was diabetic, and the parent was concerned that his needs for water were being disregarded during the school day as he had been denied access to the water fountain on a variety of occasions. The district was apparently concerned that too frequent water breaks were interrupting

the educational process and interfering with the student's ability to stay on task. To provide proper hydration while maintaining the student's presence in the classroom, the district suggested allowing the student to keep a water bottle at his desk. After an initial objection for unspecified "hygiene" reasons and logistical concerns about refilling it, the parent agreed to the accommodation, and OCR determined the matter closed.

- **3.** Is every mistake in measuring blood sugar a §504 violation? No. OCR determined that the errors by a school nurse in conducting a carbohydrate count (which error she corrected by providing the student with juice and informing the parent of the mistake), and not continuing to monitor the student's blood sugar levels on another occasion (when the difference between the current level and the desired level was medically insignificant) did not constitute violations of Section 504. *Hamilton Heights (IN) School Corporation*, 37 IDELR 130 (OCR 2002).
- **4. Staff Training.** Like the other disabilities addressed in these materials, diabetes requires monitoring of a student's condition and responding to sometimes sudden changes or emergencies. Staff training with respect to the impairment itself, how to monitor blood glucose levels, how to respond to a level that is too high or too low, how to identify danger signs from observing the student, and what to do in case of an emergency are essential. By way of reference, the American Diabetes Association suggests that staff members be trained "in testing blood glucose levels, recognizing and treating hypoglycemia and hyperglycemia, and administering insulin and glucagon." American Diabetes Association, *Your School and Your Rights*, (no date).

VI. A Final Thought: Extra OCR scrutiny for some Section §504 eligibility decisions.

The General Rule: OCR investigates procedural compliance. "In assessing whether a school has complied with the requirements of section 504, OCR takes a process-oriented approach when conducting complaint investigations and compliance reviews." *Equal Educational Opportunity and Nondiscrimination for Students with Disabilities: Federal Enforcement of Section 504*, Equal Educational Opportunity Series, Vol II., Report of the U.S. Commission on Civil Rights, September 1997, p. 98. As a general rule, OCR will not second-guess the substantive decisions made by the district in determining, for example, a student's §504 eligibility or classroom accommodations as long as the proper questions were asked by the §504 committee and the proper procedures were followed in making the determinations. The appendix to the §504 regulations provides this language. "It is not the intention of the Department, except in extraordinary circumstances, to review the result of individual placement and other educational decisions, so long as the school district complies with the process requirements of this subpart[.]" Appendix A to the §504 Subpart D Regulations. OCR letters confirm this approach. *See, for example, Oak Ridge City (TN) School District, 29 IDELR 390, 391 (OCR 1998); Virginia Beach City (VA) Public Schools, 26 IDELR 27 (OCR 1996).*

Risk of serious illness or death of a student from a decision on §504 eligibility is "Extraordinary circumstances." In response to a complaint by parents of a student denied §504 eligibility despite providing evidence from the student's doctor with respect to a peanut and tree nut allergy, OCR invoked the extraordinary circumstance language. While the school's evaluation included data from a variety of sources as required (medical reports and letters from doctor, student's health care plan, school records observations and input from principal, counselor, nurse, student's teacher and parent, the §504 Committee was properly constituted, and the determination of ineligibility was made appropriately, OCR's interest and involvement did not end at the procedural level. Finding that the procedural aspects of the case were met, OCR reminded itself (and us) of the extraordinary circumstance exception, and argued that, "the Department will place a high priority on investigating cases which may involve exclusion of a child from the education system or a pattern or practice of discriminatory placements or education." OCR found such facts here, concluding with a statement of one way to trigger substantive OCR analysis of the eligibility decision. "When a school division's decision that a student is ineligible for Section 504 services could result in the death or serious illness of the student, there is a basis for finding that the case

involves 'extraordinary circumstances' that support a substantive OCR review of the Division's decision." Gloucester County (VA) Public Schools, 49 IDELR 21 (OCR 2007). Here, OCR's substantive concerns arose from a non-eligibility decision when "the evidence from the Student's doctor was not contradicted by any other evidence, and that neither the evaluation team members nor anyone with whom they consulted had qualifications approaching those of the Student's doctor to diagnose the nature and severity of the Student's PTAs and the likelihood, nature and severity of the harm that could result from the Division's failure to find the Student eligible for Section 504 services."

A little commentary: The doctor-provided data indicated that mere exposure to peanut oils was sufficient to trigger hives (kiss on the child's cheek by someone who ate peanut butter), and that the results could be life-threatening. What is not present is a discussion of data with respect to student exposures at school, impact of those exposures, and more importantly, how the impairment deprives her of access to or benefit from the school's program. Note that OCR did not order her eligible, but the school agreed to re-evaluate.